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MONTGOMERY'S MANUAL

OF

FEDERAL PROCEDURE

SECOND EDITION

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MONTGOMERY'S MANUAL

OF

FEDERAL PROCEDURE

PRACTICE AND FORMS

SECOND EDITION

BY

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OF THE LOS ANGELES, CALIFORNIA, BAR

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DEDICATION.

To my Father, C. S. Montgomery, of the Omaha Bar, in token of affectionate esteem and admiration for his learning in the subject herein treated.

PREFACE TO SECOND EDITION.

Since the preparation of the manuscript for the first edition of this Manual a large number of decisions have been published settling points of practice under the new equity rules; also there have been a number of new statutes passed bearing on the jurisdiction and procedure of the federal courts.

The revision follows out the plan of the original work in gathering into one volume of convenient size all the statutes and court rules bearing on the subject of procedure, at law, in equity and in criminal cases, and the special procedure for removal and appeal and error.

A complete rearrangement, however, has been found necessary to accommodate new matter.

Tables of statutes, code sections, Supreme Court rules, C. C. A. rules, equity rules and constitutional provisions and amendments have been added to supplement the index in assisting the practitioner to find what is in the book in the quickest and easiest way.

The Circuit Courts of Appeals rules have been so arranged that the practitioner may see at a glance the rules in his own circuit and the corresponding and similar rule in other circuits.

The equity suit occupies thirty-four chapters in the revision instead of ten chapters in the original work. These additional chapters are to accommodate the new decisions.

Many new forms and suggestions have been added.

It is hoped that the Manual will greatly lighten the labor of the practitioner in the preparation and trial of his cases in the federal courts.

CHARLES C. MONTGOMERY.

Los Angeles, May, 1918.

PREFACE TO FIRST EDITION.

This Manual contains in *one volume,* of convenient size for office or court room use, verbatim all the federal statutes and court rules (except district courts) relating to the practice and procedure of the ordinary law, equity, or criminal case in the federal courts, with many forms and suggestions as to the steps to be taken in such cases.

Many statutes on procedure are not included in the new Judicial Code,—particularly statutes of limitations, evidence, witnesses, depositions, and costs and fees. These are included verbatim in the text, as well as the provisions of the Judicial Code annotated, and with amendments to date. The Judicial Code is also set out in its original form in the Appendix, with references to the places where its various provisions may be found in the text.

The new equity rules are set out and annotated in the Appendix, and quoted verbatim in the text whenever bearing on the subject thereof.

The Supreme Court rules and rules of all the Circuit Courts of Appeals are set out in the Appendix, and, where necessary, are quoted and referred to in the text.

The verbatim quoting of the statutes and rules is in such form that there can be no confusion as to what is and what is not a part of the statute or rule quoted.

The forms are scattered through the work in juxtaposition to the laws or rules on which they are based.

There are threefold, and in many instances fourfold, references to other works, authoritative publications containing such statutes or rules. With the assistance of the Manual, the practitioner may,

with the present law in convenient form at hand, quickly refer to its former condition, and note the similarities or changes therein. The references and annotations will also be useful in working out some of the finer points of practice, the work being designed as a guide book rather than an exhaustive treatise.

I am gratefully indebted to Mr. Claire T. Van Etten, of the Los Angeles Bar, for chapters 11, 28, 39, 40 and 41, relating to appellate jurisdiction and procedure of the Supreme Court and Circuit Court of Appeals, and also chapter 37, on "Receivers and Injunctions," and for other valuable assistance in the work. I am likewise indebted to Mr. Paul Vallee, of the Los Angeles Bar, for the annotations to the Judicial Code, the arrangement of the rules of the Circuit Courts of Appeals in the Appendix, and for much other useful aid in the preparation of the work.

CHARLES C. MONTGOMERY.

Los Angeles, California, May 1, 1914.

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FEDERAL PROCEDURE.

CHAPTER 1.

THE FEDERAL JUDICIAL SYSTEM.

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2. Federal Jurisdiction Limited.
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5. Federal Procedure at Law and in Equity.
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§ 1. Functions of the Federal Courts. Cases arising under the constitution or laws of the United States, or in which the United States or some state might be a party, ought to be insured a uniformity of decision impossible to obtain with a number of independent state judicial systems such as exist in the United States. Likewise for the sake of uniformity and also to insure national dignity and sanction, cases arising under treaties, affecting ambassadors and other public ministers and consuls, and cases of admiralty and maritime jurisdiction, should be determinable in national or federal courts. These cases are said to involve *federal questions* (chapter 6, *post*), and belong to one of the two classes of cases expressed by the federal constitution as included in the judicial power of the United States. (Art. 3, § 2, cl. 1, U. S. Const., quoted *post*, § 3.)

There also exists, where there are state sovereignties with courts more or less subject to local prejudice or political control, the necessity of impartial tribunals independent of local influence to determine controversies between citizens of different states or between the citizens of a state and aliens. Therefore, the federal courts are vested with a certain jurisdiction in cases of *diverse citizenship.* (Chapter 7, *post.*)

The judicial power of the United States extends to cases involving (1) federal questions, (2) diverse citizenship.

§ 2. Federal Jurisdiction Limited. The theory that the United States government created by the constitution is one of limited and enumerated powers, and that the constitution is the measure and test of the powers conferred,[1] applies with as much force to its judicial as to its executive and legislative powers.

At the time of the adoption of the constitution the several states had their own systems of courts, which had general jurisdiction over persons and things within their territorial limits. Whatever judicial powers were not conferred on the federal judiciary were withheld, and belonged to the several states or the people thereof.

Therefore, in prosecuting or defending any litigation in the federal court it must always be remembered that "the jurisdiction of the federal court is a limited one, depending either upon the existence of a federal question or diverse citizenship of the parties. Where these elements of jurisdiction are wanting, it cannot proceed, even with the consent of the parties."[2]

§ 3. Judicial Power Under the United States Constitution. The constitution, in defining the judicial power of the federal courts, recognized both classes of cases mentioned in the preceding section, (1) those involving federal questions, and (2) those where there might be a diversity of citizenship.

1 Calder v. Bull, 3 Dall. (U. S.) 386, 1 **L. Ed.** 648; Gibbons v. Ogden, 9 Wheat. (U. S.) 187, 6 **L. Ed.** 68; United States v. Cruikshank, 92 U. S. 542, 550, 23 **L. Ed.** 588.

2 Kardo Co. v. Adams, 231 Fed. 950, 956, 146 C. C. A. 146, quoting Byers v. McAuley, 149 U. S. 608, 37 **L. Ed.** 867, 13 Sup. Ct. 906, 910.

Art. 3, § 2, cl. 1, U. S. Const. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers, and Consuls; to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." (11 U. S. Comp. Stats. 1916, p. 14,015 et seq.)

On account of the tender consideration of states' rights, the above provision was modified as follows:

11th Amendment, U. S. Const. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." (11 U. S. Comp. Stats. 1916, p. 14,422 et seq.)

§ 4. Federal Courts Enumerated.

Art. 3, Part § 1, U. S. Const. "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (11 U. S. Comp. Stats. 1916, p. 13,906 et seq.)

District courts. Each state in the United States constitutes one or more federal judicial districts in each of which is located a federal district court. These courts are the federal courts of general, original jurisdiction. The consideration of their jurisdiction, practice and procedure occupies the first and larger part of this book. The other inferior and appellate courts are treated respectively in separate chapters devoted to each.

Court of Claims (chapter 68, *post*), with five judges, sits at Washington to take jurisdiction of claims against the United States other than pensions and sounding in tort.

Court of Customs Appeals (chapter 69, *post*), with five judges, sits at Washington and may also sit in the several circuits. It reviews decisions of the board of general appraisers under the customs and duties or tariff laws.

Circuit Court of Appeals (chapters 70 and 71, *post*) consist of three or more judges for each circuit. A justice of the supreme court is also assigned to each circuit, and district judges may be assigned to sit. These courts have final appellate jurisdiction over the district courts within their respective circuits, except where a direct appeal is allowed exclusively to the supreme court or on certification of a question from the circuit court of appeals to the supreme court.

Supreme court (chapters 72 and 73, *post*), with nine judges, sits at Washington. It has original jurisdiction of matters in which a state is a party, and of cases brought by ambassadors or other public ministers or in which a consul or vice-consul is a party. It has original and exclusive jurisdiction of cases between states and between a state and the United States, and of cases against ambassadors, other public ministers and their domestics. It has appellate jurisdiction on writ of error or appeal from the district courts in certain cases, and on writ of error from the courts of last resort of the several states in certain cases. It has appellate jurisdiction of certain cases from the circuit court of appeals, court of claims, from United States district court and supreme court of Porto Rico, the supreme court of Hawaii, district court of Alaska, the supreme court of the Philippine Islands, the court of appeals of the District of Columbia, and certain cases where a territory has become a state.

§ 5. Federal Procedure at Law and in Equity. In the Federal courts there are two systems of pleadings and practice, viz., law and equity. The same judge may sit at one time as a law judge and try a case, with a jury to determine questions of fact, and at another time he may sit as a chancellor or equity judge determin-

ing the questions of law and fact without a jury, unless he calls one in an advisory capacity. As an equity judge he will not give an equitable remedy if the remedy at law is adequate, but under new Equity Rule 22, he may transfer the case to the law side, if improperly brought on the equity side, instead of dismissing as formerly. (See chapter 37, *post.*)

The federal constitution, in various provisions, recognizes and fixes the distinction between common law and equity, especially in the seventh amendment preserving the right of trial by jury in suits at common law where the value in controversy shall exceed twenty dollars.

This double system was inherited from England, where formerly there were separate courts of law and equity, with a chancellor or equity judge sitting on the equity bench and a common-law judge on the common-law bench.

In most of the states to-day the same form of action is used in an equity case as in a law case and the system is a blending of law and equity. But the main distinctions between law and equity are nevertheless maintained: (1) Preserving the right to trial by jury in law cases; (2) refusing to give equitable remedies where the legal remedies of possession or compensation are adequate; and (3) enforcing equitable decrees in certain cases by process for contempt for neglect or refusal to obey.

The reason for the original separation of the two systems is historical and not in the inherent nature of these branches of the law, but it seems that the distinction will remain an essential element of our system, even in the blended or reform procedure, so long as the right to trial by jury is preserved for common-law cases.

Congress by the adoption of the act of March 3, 1915, c. 90, adding § 274b to the Jud. Code, has already taken a long step forward in progress toward the reform system of pleading, opening a way for further legislation after the act has been more fully subjected to the tests of practice. (See § 545, *post.*)

§ 6. Differences in Procedure at Law and in Equity in the Federal Courts. In the Federal courts an action at law differs from a suit in equity in a number of particulars, in the main as follows:

(1) *Pleading:* At law, conforms "as near as may be" to state practice; in equity is governed by equity rules. (2) *Trial:* At law, defendant entitled to a jury to determine issues of fact; in equity, issues both at law and fact are determined by the judge. (3) *Relief granted:* At law, compensation or possession; in equity, preventive, specific, foreclosure, receiverships and all other remedies except legal, but including compensation and possession as incidental to the equitable relief sought. Equitable remedies are not given where legal remedies are adequate and complete. (4) *Enforcing final orders:* A judgment at law is enforceable by execution and writ of assistance; equitable decree by execution for money judgments, by contempt proceedings for specific or preventive relief when necessary under Equity Rule 8, and writ of assistance for possession under Equity Rule 9. (Chapter 56, *post.*) (5) *Review in appellate court:* At law, by writ of error; in equity, by appeal. (Chapter 75, *post.*)

§ 7. Actions at Law—Wherein Conform to State Practice. Generally speaking, an action at law is an action wherein is sought the remedy of possession or compensation without any equitable incidents requiring the aid of equity.

Among the equitable incidents requiring the aid of equity are fraud, accident, mistake, trusts, the necessity of avoiding a multiplicity of suits, and the inadequacy of the legal remedies.

Under § 914 et seq. of the Revised Statutes, the conduct of an action at law conforms "as near as may be" to that existing at the time in like causes in the courts of record of the state within which such district court is held. Chapter 15, *post*, summarizes the proceedings in a law action with reference to conformity to state practice.

Pleading and practice in a law case in the federal courts are governed by the state statutes and state court rules, except in those

matters (1) where there has been congressional action by statutory enactments, or (2) which involve the judge's personal administrative powers, or (3) where the federal district court rules have established such minor changes as the difference in jurisdiction and organization of the state and federal courts may require.

In addition to a good cause of action there must always be an affirmative showing (1) of ground of federal jurisdiction; (2) that the requisite amount in controversy is involved, which in cases of concurrent jurisdiction with the state courts must exceed, exclusive of interest and costs, the sum or value of three thousand dollars, except in certain cases set out in § 24 of the Judicial Code; (3) that the action is one at law as distinguished from equity; and it should also appear (4) that the venue of the action is properly laid under the federal statutes.

§ 8. Suits in Equity—Rules of Procedure. Suits in equity are governed by the equity rules promulgated by the United States supreme court, under § 917, Revised Statutes, with such minor variations not inconsistent with those rules as the district judges, with the concurrence of a majority of the circuit judges for the circuit, may from time to time establish under Equity Rule 79 and under §§ 913 and 918, Revised Statutes. Chapter 25, *post*, gives the main steps in an equity suit under these rules.

In a suit in equity, as in an action at law, regard must be paid to (1) the ground of federal jurisdiction, (2) that there is the requisite amount in controversy, (3) that the cause is equitable as distinguished from legal, (4) and the proper venue.

§ 9. Possibility of a Federal Blended Procedure. To establish a federal blended procedure it would seem that very few rules would be required for a law action additional to those now existing for the conduct of a suit in equity. It would be necessary to make provision (1) to preserve the right of a jury trial for questions of fact in law actions; (2) to adjust the giving of equitable remedies and legal remedies in the same suit or separate suits determinable at the same time; and (3) to provide for

the enforcement of state statutory remedies wherein same may not be conformable to the federal practice. The adoption of such a system would be a strong influence toward uniformity and simplicity in state systems.

A remarkable innovation in federal procedure has been created by the act of March 3, 1915, chapter 90, adding § 274b to the Jud. Code, permitting equitable defenses to an action at law (quoted and annotated § 545, *post*). This is a great step toward the abolition of the distinction between the two systems of pleading and practice, and establishing in the federal courts the reform mode of procedure.

§ 10. Differences Between Federal and State Court Procedure. The differences between federal and state practice and procedure are due (1) to the limited nature of federal jurisdiction requiring (a) some ground of federal jurisdiction to be involved in all actions in the federal court, and (b) that in certain cases the amount in controversy must exceed three thousand dollars exclusive of interest and costs; (2) to the distinctions maintained in federal courts between actions at law and suits in equity; (3) to the federal statutes relating to venue.

It will be seen from the above that there are four points for consideration in determining the jurisdiction and consequent procedure in actions brought in federal courts.

First, whether or not a federal ground of jurisdiction is involved, because some such ground must appear in addition to the facts necessary generally to constitute a cause of action. These grounds of federal jurisdiction are treated in chapters 6 and 7, respectively, entitled "Federal Questions," "Diverse Citizenship."

Second, whether or not there is the requisite amount in controversy. Congress, having power in its discretion to establish inferior courts, necessarily has power to define their jurisdiction. In defining the jurisdiction of the district court, the federal statutes have fixed a limitation based on the amount in controversy. This subject is treated in chapter 8, entitled "Amount in Controversy."

Third, whether or not the suit is at law or in equity. A separate system of procedure has been rendered necessary in federal equity suits, because a number of states have adopted a blended form of procedure, combining legal and equitable causes of action and defenses, while the federal system has maintained the distinctions between law and equity.

Chapters 15 to 24, inclusive, give the main proceedings for an action at law in the federal court indicating in what respects the state courts' procedure is followed and in what particulars the practice is not in conformity with that of the state courts; and chapters 25 to 58, inclusive, give the procedure for a suit in equity in the federal court.

Fourth, certain restrictions have been adopted in the federal courts respecting the place of trial of actions, or venue. These restrictions are not jurisdictional if waived by the parties, but may defeat the action if timely objection be made. On removal, timely objection on this ground may cause the case to be remanded. This subject of venue is treated in chapter 4, entitled "Territorial Jurisdiction—Venue."

§ 11. Why a Special Study of Federal Procedure Required. *Federal equity procedure* is now wonderfully simplified under the equity rules which took effect February 1, 1913 (Appendix), and the Judicial Code which took effect January 1, 1912 (Appendix).

There will be but little difficulty in mastering the present equity procedure if the practitioner will bear in mind the points mentioned in the preceding section respecting jurisdiction, federal and equitable, amount in controversy and venue.

But special study of the subject is required because the federal equity procedure is a complete, separate system differing in many vital particulars from state systems.

In chapter 25, entitled "A Suit in Equity—Summary," are set out the main points in the conduct of a suit in equity and the time within which each step must be taken.

For an action at law in the federal court, the practitioner must search out those matters wherein the federal statutes, federal court rules and decisions have changed the mode of procedure from that in the state court.

In chapter 15 *post*, "An Action at Law—Summary," it is endeavored to indicate the main points in conformity and those not in conformity with state practice.

In chapters 59 to 67 are set out statutes relating to criminal procedure.

Appellate procedure is dealt with in chapters 74 and 75.

Procedure in removal of cases from a state to the federal district court is treated in chapter 9.

§ 12. Desirability of Special Study of Federal Procedure. The number of cases coming under federal jurisdiction, particularly the concurrent jurisdiction of the federal district court, is greatly increasing with the consolidation and combination of businesses and with the growth of national control of matters formerly left to state legislation.

Time devoted to the study of federal jurisdiction and procedure will be well spent in view of the strong tendency toward national control of numerous matters affecting the different business interests in every community.

A special study of federal procedure is required if the lawyer desires to be equipped to handle business of importance. The larger the interests involved, the greater liability there is of such matters being in litigation in the federal rather than the state court, either by being brought there originally or on removal. The necessity is undoubtedly increasing for the state practitioner to become conversant with the judicial system, jurisdiction and procedure not only of his own state (and to some extent of other states), but also of the nation.

CHAPTER 2.

JUDICIAL OFFICERS—DISTRICT COURT.

SEC.

20. Judicial Officers Enumerated.
21. Judges—Division of Business and Assignment of Cases for Trial.
22. Designation of District Judges to Hold Court in Place or Aid of Another District Judge.
23. Circuit Judge, When to Act as District Judge.
24. Outside District Judges for Districts in the Second Circuit.
25. Substitutes in Cases of Interest, Relationship, Bias or Prejudice.
26. Duties and Powers of Judges Designated in Place or Aid of District Judges.
27. Other Judicial Officers—Disqualification for Appointment.
28. Clerks and Deputy Clerks.
29. Marshals.
30. Deputy Marshals.
31. Marshal's Field Deputies.
32. Criers and Bailiffs.
33. United States District Attorneys.
34. Assistant District Attorneys.
35. Court Commissioners.

§ 20. Judicial Officers Enumerated. In every state in the United States there is at least one federal judicial district. These districts are described with their terms and places of holding court in chapter 5, Jud. Code (Appendix, *post*).

§ 1, Jud. Code (Appendix, *post*), provides for at least one judge in every district except certain districts in Alabama, Mississippi, and Tennessee.

Since the adoption of the Judicial Code there have been passed various acts for additional judges for several districts. These acts will appear in an appendix under those sections of chapter 5 of the Judicial Code setting out the districts in the several states. The states are arranged in alphabetical order.

Other judicial district officers are: a clerk, deputy clerks, a marshal, deputy marshals, field deputy marshals, bailiffs, court

crier, district attorney, assistant district attorneys, and sometimes counsel to aid the district attorney.

There are also court commissioners (§ 35, *post*), receivers (chapter 53, *post*), examiners, masters in chancery under Equity Rule 68 (chapter 51, *post*), and officers appointed under the bankruptcy laws not covered by this work.

§ 21. Judges—Division of Business and Assignment of Cases for Trial. Where there is more than one judge in a district they have authority, under § 23, Jud. Code (Appendix, *post*), to agree upon a division of business and assignment of cases for trial, but in case they do not so agree, the senior circuit judge shall make the necessary orders.

§ 22. Designation of District Judges to Hold Court in Place or in Aid of Another District Judge. When any district judge is prevented by any disability from holding court, § 13, Jud. Code (Appendix, *post*), provides for the appointment of another district judge from the same circuit, or if public interest so requires, a judge from any district in another circuit.

So likewise, when from the accumulation or urgency of business in any district court the public interests require the aid of another judge, § 14, Jud. Code (Appendix, *post*), authorizes the appointment of one from another district in the same circuit, who may hold court separately at the same time as the other judges.

Ordinarily the appointment is made by any circuit judge of the circuit in which the district lies, and in their absence by the circuit justice of the circuit in which the district lies. But in case of absence or inability of such circuit judge and circuit justice, § 15, Jud. Code (Appendix, *post*), designates the chief justice of the United States to make the appointment.

Likewise under § 16, Jud. Code (Appendix, *post*), a new designation and appointment of any other district judge is authorized.

When the senior circuit judge is present in the circuit, it is his duty, under § 17, Jud. Code (Appendix, *post*), to appoint the dis-

trict judge of any judicial district within his circuit to hold court in the place or in aid of any other district judge within the same circuit.

§ 23. Circuit Judge, When to Act as District Judge. Under § 18, Jud. Code (Appendix, *post*), a circuit judge may sometimes be assigned to hold district court.

§ 24. Outside District Judges for Districts in the Second Circuit. By the amendment of October 3, 1913, c. 18, to § 18, Jud. Code (Appendix, *post*), district judges from other circuits for the second circuit may be appointed if they consent in writing and the senior circuit judge of the circuit within which the designated judge resides certifies in writing that the business of the district of such judge shall not suffer thereby.

§ 25. Substitutes in Cases of Interest, Relationship, Bias or Prejudice. Provisions are made for an outside judge in case of interest or relationship of the incumbent by § 20, Jud. Code (Appendix, *post*), and for the designation of another judge on affidavit of personal bias or prejudice of the trial judge by § 21, Jud. Code (Appendix, *post*).

§ 26. Duties and Powers of Judges Designated in Place or Aid of District Judges. By § 19, Jud. Code (Appendix, *post*), the outside judge is given all the duties and powers of a district judge of the district for which he is appointed.

§ 27. Other Judicial Officers—Disqualification for Appointment. Under § 67, Jud. Code (Appendix, *post*), no person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to the judge of such court. An exception is made in the amendment of December 21, 1911, c. 4, allowing persons employed

in the circuit courts, which were abolished, to be employed in the district court succeeding to such circuit court's jurisdiction.

By § 68, Jud. Code (Appendix, *post*), no clerk or his deputy may be appointed master or receiver in any case, except for special reasons assigned in the order of appointment.

§ 28. Clerks and Deputy Clerks. A clerk of the district court is appointed by the judge thereof under § 3, Jud. Code (Appendix, *post*), except as otherwise provided by law.

The deputy clerks, under § 4, Jud. Code (Appendix, *post*), are appointed by the clerks with the approval of the district judge.

The term of the district clerk is at the will of the district judge (Ex parte Herman, 13 Pet. (U. S.) 230, 10 **L. Ed.** 138), and of the deputy clerks, at the pleasure of the clerk appointing them, with the concurrence of the district judge, under § 4, Jud. Code (Appendix, *post*).

The *oath* of the clerk is set out in § 794, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 637; 2 U. S. Comp. Stats. 1916, § 1321, p. 2182).

A *bond* is required under § 795, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 637; 2 U. S. Comp. Stats. 1916, § 1322, p. 2183), and see § 220, Jud. Code (Appendix, *post*), and § 3, Act Feb. 22, 1875, c. 95, 18 Stats. 333 (4 Fed. Stats. Ann., 2d ed., p. 640; 2 U. S. Comp. Stats. 1916, § 1196, p. 1557)

Additional bonds may be required, when the business of the court makes necessary, under the provisions of § 2, Act Feb. 22, 1875, c. 95, 18 Stats. 333 (4 Fed. Stats. Ann., 2 ed., p. 639; 2 U. S. Comp. Stats. 1916, § 1331, p. 2188).

If any clerk shall willfully refuse or neglect to make any report, certificate, statement or other document required by law to be by him made, he may be removed by the President (§ 5, Act Feb. 22, 1875, c. 95, 18 Stats. 333 (4 Fed. Stats. Ann., 2d ed., p. 773; 2 U. S. Comp. Stats. 1916, § 1328, p. 2187).

For failure to do as set out in § 5, same act, there is an additional punishment provided, § 6, said act, making the neglect or refusal a misdemeanor.

The bond of deputy clerks is required under § 796, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 640; 2 U. S. Comp. Stats. 1916, § 1324, p. 2185).

The *oath* of the deputy clerk is the same as that of the clerk

§ 29. Marshals.

§ *776, Rev. Stats.* "A marshal shall be appointed in each district, except in the middle district of Alabama, and the northern district of Georgia, and the western district of South Carolina. The marshal of the southern district of Alabama shall perform the duties of marshal of the middle district of said state, and shall keep an office at Montgomery in said middle district. The marshal of the southern district of Georgia shall perform the duties of marshal of the northern district of said state. The marshal of the eastern district of South Carolina shall perform the duties of marshal of the western district of said state." (4 Fed. Stats. Ann., 2d ed., p. 626; 2 U. S. Comp. Stats. 1916, § 1302, p. 2162.)

That portion of the above-quoted section, relating to certain districts of Alabama and Georgia, has been superseded by special provisions for those states. These provisions with a number of others relating to officers in particular districts may be found in 4 Fed. Stats. Ann., 2d ed., pp. 777–799; 2 U. S. Comp. Stats. 1916, §§ 1341–1374, p. 2196 et seq.

The *term* of the marshal is four years, under § 779, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 627; 2 U. S. Comp. Stats. 1916, § 1303, p. 2163).

Vacancies in marshal's office may be filled under § 793, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 621; 2 U. S. Comp. Stats. 1916, § 1318, p. 2181), and § 2, Act June 24, 1898, c. 495 (4 Fed. Stats. Ann., 2d ed., p. 625; 2 U. S. Comp. Stats. 1916, § 1320, p. 2182).

The *oath* of the marshal is defined by § 782, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 629; 2 U. S. Comp. Stats. 1916, § 1305, p. 2165).

The *bond* of the marshal is required by § 783, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 640; 2 U. S. Comp. Stats. 1916, § 1307, p. 2166).

Suit on marshal's bond is authorized under § 784, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 642; 2 U. S. Comp. Stats. 1916, § 1308, p. 2167).

Bond to be further security after judgment is provided in § 785, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 645; 2 U. S. Comp. Stats. 1916, § 1309, p. 2171).

Limitation of suit on bond is defined in § 786, Rev Stats. (4 Fed. Stats. Ann., 2d ed., p. 646; 2 U. S. Comp. Stats. 1916, § 1310, p. 2171).

§ 30. Deputy Marshals.

§ *780, Rev. Stats.* "(Deputy marshals.) Every marshal may appoint one or more deputies, who shall be removable from office by the judge of the district court, or by the circuit court for the district, at the pleasure of either." (4 Fed. Stats. Ann., 2d ed., p. 627; 2 U. S. Comp. Stats. 1916, § 1304, p. 2164).

Oath of deputy marshal set out in § 782, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 629; 2 U. S. Comp. Stats. 1916, § 1305, p. 2165).

§ *10, Act May 28, 1896, c. 252.* (Marshal's office deputies and clerks.) "That when in the opinion of the Attorney General the public interest requires it, he may, on the recommendation of the marshal, which recommendation shall state the facts as distinguished from conclusions, showing necessity for the same, allow the marshals to employ necessary office deputies and clerical assistance, upon salaries to be fixed by the Attorney General, from time to time, and paid as hereinafter provided. When any of such office deputies is engaged in the service of any writ, process, subpoena, or other order of the court, or when necessarily absent from the place of his regular employment, on official business, he shall be allowed his actual traveling expenses only, and his necessary and actual expenses for lodging and subsistence, not to ex-

ceed three dollars per day, and the necessary actual expenses in transporting prisoners, including necessary guard hire; and he shall make and render accounts thereof as hereinafter provided." (4 Fed. Stats. Ann., 2d ed., p. 740; 2 U. S. Comp. Stats., 1916, § 1425, p. 2317.)

§ 31. Marshal's Field Deputies.

§ 11, Act May 28, 1896, c. 252, as amended by act March 4, 1911, c. 269. "That at any time when, in the opinion of the marshal of any district, the public interest will thereby be promoted, he may appoint one or more deputy marshals for such district, who shall be known as field deputies, and, who, unless sooner removed by the district court as now provided by law, shall hold office during the pleasure of the marshal, except as hereinafter provided, and who shall each, as his compensation, receive the gross fees, including mileage, as provided by law, earned by him, not to exceed one thousand five hundred dollars per fiscal year, or at that rate for any part of a fiscal year; and in addition shall be allowed his actual necessary expenses, not exceeding two dollars a day, while endeavoring to arrest, under process, a person charged with or convicted of crime: *Provided,* That a field deputy may elect to receive actual expenses on any trip in lieu of mileage: *Provided further,* That in special cases, where in his judgment justice requires, the Attorney General may make an additional allowance, not, however, in any case to make the aggregate annual compensation of any field deputy in excess of two thousand five hundred dollars nor more than the gross fees earned by such field deputy. The marshal, immediately after making any appointment or appointments under this section, shall report the same to the Attorney General, stating the facts as distinguished from conclusions constituting the reason for such appointment, and the Attorney General may at any time cancel any such appointment as the public interest may require." (4 Fed. Stats. Ann., 2d ed., p. 628; 2 U. S. Comp. Stats. 1916, § 1423, p. 2317.)

§ 32. Criers and Bailiffs. The court appoints a crier and the marshal may appoint not to exceed five bailiffs, under § 5, Jud. Code (Appendix, *post*).

§ 33. United States District Attorneys.

§ *767, Rev. Stats.* "(District attorneys—for all the districts.) There shall be appointed in each district, [except in the middle district of Alabama, and the northern district of Georgia, and the western district of South Carolina], a person learned in the law, to act as attorney for the United States in such district. [The district attorney of the northern district of Alabama shall perform the duties of district attorney of the middle district of said State; and the district attorney of the southern district of Georgia shall perform the duties of district attorney of the northern district of said State; and the district attorney of the eastern district of South Carolina shall perform the duties of district attorney for the western district of said State]." (4 Fed. Stats. Ann., 2d ed., p. 619; 2 U. S. Comp. Stats. 1916, § 1294, p. 2154.)

Those portions of the above-quoted section in brackets have been superseded by special provisions. There are also other special provisions relating to other states. Such special provisions may be found in 4 Fed. Stats. Ann., 2d ed., pp. 777–799; 2 U. S. Comp. Stats. 1916, §§ 1341–1374, p. 2196 et seq.

Their *term* is four years and they are required to be sworn under § 769, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 624; 2 U. S. Comp. Stats. 1916, § 1295, p. 2156).

Special counsel may be retained to aid United States district attorneys under § 363, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 620; 1 U. S. Comp. Stats. 1916, § 538, p. 282), but heads of departments must call on department of justice for counsel under § 189, Rev. Stats. (3 Fed. Stats. Ann., 2d ed., p. 258; 1 U. S. Comp. Stats. 1916, § 271, p. 116).

Compensation and oath of such special counsel are provided for in § 366, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 622; 1 U. S. Comp. Stats. 1916, § 541, p. 285).

Vacancies in office may be temporarily filled under § 793, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 626; 2 U. S. Comp. Stats. 1916, § 1318, p. 2181).

§ 34. Assistant District Attorneys.

Part § 8, Act May 28, 1896, c. 252. "That whenever, in the opinion of the district judge of any district or the chief justice of any territory and the district attorney, evidenced by writing, the public interest requires it, one or more assistant district attorneys may be appointed, by the Attorney General; but such opinion shall state to the Attorney General the facts as distinguished from conclusions, showing the necessity therefor. Such assistant district attorneys shall be paid such salary as the Attorney General may from time to time determine as to each, which shall in no case exceed two thousand five hundred dollars per annum: *Provided,* That the necessary expenses for lodging and subsistence actually paid, not exceeding four dollars per day and actual and necessary traveling expenses of the district attorney and his assistants, while absent from their respective official residences and necessarily employed in going to, returning from, and attending before any United States court, commissioner, or other committing magistrate, and while otherwise necessarily absent from their respective official residences on official business, shall be allowed and paid in the manner hereinafter provided." (4 Fed. Stats. Ann., 2d ed., p. 622; 2 U. S. Comp. Stats. 1916, § 1420, p. 2313.)

The provisions of the above-quoted section do not apply to Alaska, Southern District of New York nor District of Columbia (§ 24, Act May 28, 1896, c. 252; 4 Fed. Stats. Ann., 2d ed., p. 721; 2 U. S. Comp. Stats. 1916, § 1431, p. 2321).

§ 35. Court Commissioners. These are officers with magisterial powers in both civil and criminal matters coming under the jurisdiction of the federal laws.

Part § 19, Act May 28, 1896, c. 252, as amended Act March 2, 1901, c. 814. "It shall be the duty of the district court of each judicial district to appoint such number of persons, to be known as United States commissioners, at such places in the district as may be designated by the district court, which United States commissioners shall have the same powers and perform the same duties as are now imposed upon commissioners of the circuit courts. The appointment

of such United States commissioners shall be entered of record in the district courts, and notice thereof at once given by the clerk to the Attorney General. That such United States commissioners shall hold their offices, respectively, for the term of four years, but they shall be at any time subject to removal by the district court; and no person shall at any time be a clerk or deputy clerk of a United States court and a United States commissioner without the approval of the Attorney General: *Provided,* That all acts and parts of acts applicable to commissioners of the circuit courts, except as to appointment and fees, shall be applicable to United States commissioners appointed under this act. Warrants of arrest for violations of internal revenue laws may be issued by United States commissioners upon the sworn complaint of a United States district attorney, assistant United States district attorney, collector or deputy collector of internal revenue, or revenue agent or private citizen, but no such warrant of arrest shall be issued upon the sworn complaint of a private citizen unless first approved in writing by a United States district attorney. That United States commissioners and all clerks and all deputy clerks of United States courts are hereby authorized to administer oaths." (4 Fed. Stats. Ann., 2d ed., p. 631; 2 U. S. Comp. Stats. 1916, § 1333, p. 2189.)

Commissioners may be appointed by the district judge to administer oaths to appraisers of vessels or goods and merchandise seized for breaches of the laws of the United States—§ 61, Jud. Code (Appendix, *post*).

The duties of these officers are prescribed by law, and they are, in general, to issue warrants for offenses against the United States; to cause the offenders to be arrested and imprisoned, or bailed, for trial, and to order the removal of offenders to other districts—§ 1014, Rev. Stats. (2 Fed. Stats. Ann., 2 ed., p. 654; 3 U. S. Comp. Stats. 1916, § 1674, p. 3447); § 1015, Rev. Stats. (1 Fed. Stats. Ann., 2d ed., p. 490; 3 U. S. Comp. Stats. 1916, § 1679, p. 3485); § 1016, Rev. Stats. (1 Fed. Stats. Ann., 2d ed., pp. 490, 491; 3 U. S. Comp. Stats. 1916, § 1680, p. 3486).

To hold to security of the peace and for good behavior, § 270, Jud. Code (Appendix, *post*).

To carry into effect the award or arbitration, or decree of any consul of any foreign nation; to sit as judge or arbitrator in such differences as may arise between the captains and crews of any vessels belonging to the nations whose interests are committed to his charge; and to enforce obedience by imprisonment until such award, arbitration or decree is complied with—§ 271, Jud. Code (Appendix, *post*).

To take bail and affidavits in civil causes—§ 945, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 772; 3 U. S. Comp. Stats. 1916, § 1571, p. 3131).

To discharge poor convicts imprisoned for nonpayment of fines—§ 1042, Rev. Stats. (3 Fed. Stats. Ann., 2d ed., p. 328; 3 U. S. Comp. Stats. 1916, § 1706, p. 3569).

To administer oaths and take acknowledgments—§ 1778, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 772; 4 U. S. Comp. Stats. 1916, § 3259, p. 4455).

To institute prosecutions under the laws relating to crimes against the elective franchise, and civil rights of citizens, and to appoint persons to execute warrants thereunder—§§ 1982–1985, Rev. Stats. (2 Fed. Stats. Ann., 2d ed., p. 133; 4 U. S. Comp. Stats. 1916, § 3935, p. 4805).

To issue search-warrants authorizing internal revenue officers to search premises, where a fraud upon the revenue has been committed—§ 3462, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 323; 6 U. S. Comp. Stats. 1916, § 6364, p. 7399).

To summon masters of vessels to appear before him and show cause why process should not issue against such vessel—§ 4546, Rev. Stats. (Fed. Stats. Ann., 2d ed., title "Seamen"); 7 U. S. Comp. Stats. 1916, § 8335, p. 8838).

To issue warrants for and examine persons charged with being fugitives from justice—§§ 5270, 5271, Rev. Stats. (3 Fed. Stats. Ann., 2d ed., p. 265 and p. 281; 10 U. S. Comp. Stats. 1916, §§ 10,110, 10,111, p. 12,367 et seq.).

"While their duties are thus prescribed by law, and while they are, to a certain extent, independent in their statutory and judicial action, there is no law providing how their duties shall be

performed, and so far as relates to their administrative action, we think they were intended to be subject to the orders and directions of the court appointing them. As was said by this court in Griffin v. Thompson, 43 U. S. (2 How.) 244, 257, 11 **L. Ed.** 253, 258, 'there is inherent in every court a power to supervise the conduct of its officers, and the execution of its judgments and process. Without this power courts would be wholly impotent and useless.' While no express power is given over these officers by statute, their relations to the court are such that some power of this kind must be implied. Though not strictly officers of the court, they have always been considered in the same light as masters in chancery and registers in bankruptcy, and subject to its supervision and control. What shall be the nature of the requirements in each particular case must be left largely to the discretion of the court. Certainly we cannot presume that the court will abuse its discretion, or will act otherwise than is deemed conducive to the public good.'' (U. S. v. Allred, 155 U. S. 591, 39 **L. Ed.** 273, 15 Sup. Ct. 231.)

CHAPTER 3.

JUDICIAL DISTRICTS, TERMS, RECORDS, REPORTS AND RULES OF PRACTICE.

SEC.

50. Judicial Districts, Terms and Places of Holding Court.
51. Special Terms, Adjournments and Continuances.
52. When Courts are Open.
53. Orders of Judge at Chambers and in Vacation.
54. District Court Records.
55. Reports of Decisions.
56. Admission to Practice Before.
57. Rules of Practice—Law Actions.
58. Rules of Practice—Equity Suits.

§ 50. Judicial Districts, Terms and Places of Holding Court. Chapter 5, Jud. Code (Appendix, *post*), sets out in alphabetical order the states, with the judicial districts and divisions into which they are divided, the counties included in each district and division, the time of holding the regular terms of court and the places where the courts sit.

A judicial district includes the territory embraced in certain counties of some state at a given date. Each state contains one or more judicial districts. The territorial limits of a district never include territory of more than one state.

Many districts are subdivided into divisions for convenience in holding court.

§ 51. Special Terms, Adjournments and Continuances. Judicial officers for district courts have been treated in chapter 2 above.

Special terms may be ordered by the district judge when business requires, under § 11, Jud. Code (Appendix, *post*).

If the judge is absent, the marshal or clerk may adjourn court by order under § 12, Jud. Code (Appendix, *post*).

So, also, if the office of judge becomes vacant, the clerk may continue pending proceedings, under § 22, Jud. Code (Appendix, *post*).

Trials commenced may be completed in a new term. They are not stayed or discontinued by the arrival of a new term, under § 8, Jud. Code (Appendix, *post*).

Monthly adjournments of terms may be made to expedite criminal cases, under § 10, Jud. Code (Appendix, *post*).

The altering of terms does not affect the validity of proceedings already taken, and matters pending are triable in the next term following, under § 7, Jud. Code (Appendix, *post*).

§ 52. When Courts are Open. The district courts, as courts of admiralty and as courts of equity, are always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. This is a provision of § 9, Jud. Code (Appendix, *post*), and Equity Rule 1.

§ 53. Orders of Judge at Chambers and in Vacation. Any district judge may, upon reasonable notice to the parties, make, direct and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court. This is the provision of latter part § 9, Jud. Code (Appendix, *post*), and also Equity Rule 1.

§ 54. District Court Records. Records of the district court are kept where the court is held, and, if more than one of such places, where the district judge designates under § 6, Jud. Code (Appendix, *post*). On a territory becoming a state, provisions for transferring territorial records to the federal district court appear in §§ 62 and 63, Jud. Code (Appendix, *post*).

§ 55. Reports of Decisions. The decisions of the district courts are to be found in the Federal Reporter, containing, in 1917, about 244 volumes. This set also contains the United States circuit court decisions up to the time said court was abolished, January 1, 1912. It also contains the decisions of the circuit court of appeals, established in 1891, and the commerce court, established in 1911, and since abolished. (As to the commerce court, see chapter 9, Jud. Code, in our Appendix.) Decisions prior to 1880 are contained in the Federal Cases.

§ 56. Admission to Practice Before. The rules for admission to practice before the district courts of the United States are contained in the court rules adopted by the several district courts, and vary in the different districts. Generally, attorneys who have been admitted to practice in the state courts are eligible to be admitted on motion.

§ 57. Rules of Practice—Law Actions. This subject is treated *post,* chapters 15 to 24, inclusive. The rules governing law actions generally conform to those of state courts of record as modified by federal statutes and rules of practice of the district courts in the several districts. Among the conformity statutes are §§ 914, 915, 916, 918, 990, 991, 993, 966, 967, 858, Rev. Stats. of the United States, and Act June 1, 1874, c. 200. There are numerous special federal statutes dealing with various subjects relating to procedure. Among some of such subjects are venue, amendments, evidence, depositions, witnesses, costs and fees and bills of exceptions. See chapter 15, *post,* summarizing these statutes.

§ 58. Rules of Practice — Equity Suits. Equity suits are governed by the United States statutes, supreme court rules and additional district court rules. Under § 917, Rev. Stats., the supreme court is given power to prescribe rules in equity and admiralty suits, and under §§ 918 and 913, Rev. Stats., and Equity Rule 79, the district courts may prescribe additional rules for their own practice. The equity suit is treated *post,* chapters 25 to 55, inclusive.

CHAPTER 4.

TERRITORIAL JURISDICTION—VENUE.

SEC.

60. In General.
61. Civil Suits—In General.
62. Nonlocal Suits in State of More than One District.
63. Nonlocal Suits Where District Contains More than One Division—Criminal Cases—Transfer.
64. Local Suits With Defendant in Another District Same State.
65. Local Suits With Subject Matter Lying Partly in One District and Partly in Another.
66. Liens—Clouds on Title—Absent Defendant.
67. Receiver's Jurisdiction Over Real Property in Other Districts in Circuit.
68. Transfer to Another Division on Stipulation.
69. On Creation of New District or Division or Transfer of Territory.
70. Same—Preservation and Enforcement of Liens.
71. Infringement of Letters Patent.
72. Under Copyright Laws.
73. To Enjoin Comptroller of Currency.
74. Part of Several Defendants not Found.
75. Crimes and Offenses.
76. Penalties and Forfeitures.
77. Taxes and Internal Revenue.
78. Condemnation Insurrectionary Property.
79. Seizures for Forfeiture—Embargo or Insurrection.
80. Prosecutions for Failure to File Tariffs, Giving Rebates, etc.
81. Prosecutions for Violations of the Sixteen Hour Law.
82. Suits Affecting Orders of Interstate Commerce Commission.
83. Prosecutions for Injuries to Fortifications.
84. Prosecutions of Offenses Against the Postal Laws in Selling Intoxicating Liquors.
85. Prosecutions for Violations of Immigration Laws.
86. Issue of Venue—How Raised.

§ 60. **In General.** In considering the subject of venue, the federal district or division corresponds to the county in state systems.

The distinctions exist in the federal as in the state practice respecting suits of local and suits transitory in their nature. Suits of a local nature must be brought in the district in which lies some

part of the land or other property of a fixed character, the subject of the suit.

Suits not of a local nature should be brought in the district whereof the defendant is an inhabitant, except where the jurisdiction is founded only on the fact that the action is between citizens of different states, in which case the suit shall be brought only in the district of residence of either the plaintiff or the defendant. These are the provisions of § 51, Jud. Code, quoted § 61, *post.*

Where there is more than one district in a state and several defendants in a suit not of a local nature, it may be brought where any of the defendants reside and process issued to the other defendants residing in other districts in the state. (§ 52, Jud. Code, quoted § 62, *post.*)

In like manner, where there is more than one division in a district and several defendants in a suit not of local nature, the suit may be brought in the division of the residence of any of the defendants and process issued to the other defendants in other divisions and districts in the state. (§ 53, Jud. Code, quoted § 63, *post.*)

Suits of local nature should be brought where the land lies, and if a defendant resides in a different district in the same state, original process may be served on him therein. (§ 54, Jud. Code, quoted § 64, *post.*)

If the suit is of local nature and the subject matter lies partly in one district and partly in another within the same state, suit may be brought in either district. (§ 55, Jud. Code, quoted § 65, *post.*)

In suits to enforce any legal or equitable lien upon, or claim to, or to remove any encumbrance or lien or cloud upon the title to, real or personal property within the district where the suit is brought, service may be made on nonresident or absent defendants by publication. (§ 57, Jud. Code, quoted § 66, *post.*)

In a suit in which a receiver is appointed, where the land or other property of a fixed character, the subject of the suit, lies within different states in the same circuit, the receiver upon proper

proceedings may control same, although outside the district of his appointment. (§ 56, Jud. Code, quoted § 67, *post.*)

There are special provisions relating to crimes and offenses (§ 75, *post*); penalties and forfeitures (§ 76, *post*); taxes and internal revenue (§ 77, *post*); seizures (§ 79, *post*); patent cases (§ 71, *post*); under the copyright laws (§ 81, *post*); suits against the comptroller of currency (§ 73, *post*); prosecutions for injuries to fortifications (§ 83, *post*); prosecutions for violations of the postal laws regarding use of the mails advertising, etc., in prohibition states, intoxicating liquors (§ 84, *post*); prosecutions for violations of the sixteen hour law (§ 81, *post*); interstate commerce act (§ 82, *post*); failure to file tariffs, etc. (§ 80, *post*); and prosecutions for violation of the immigration laws (§ 85, *post*).

§ 61. Civil Suits—In General.

§ *51, Jud. Code* (*Embracing* § *739, Rev. Stats.*). "Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." (5 Fed. Stats. Ann., 2d ed., p. 486; 1 U. S. Comp. Stats. 1916, § 1033, pp. 1116–1159; Simkins' Federal Equity Suit, 3d ed., pp. 48, 53, 92, 94, 96, 100, 110, 314, 316, 333, and 833.)

This section is substantially what was already the law.

§ 62. Nonlocal Suits in State of More Than One District.

§ *52, Jud. Code* (*Re-enacting* § *740, Rev. Stats.*). "When a state contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the state, it may be brought

in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same state." (5 Fed. Stats. Ann., 2d ed., p. 518; 1 U. S. Comp. Stats. 1916, § 1034, p. 1159; Simkins' Federal Equity Suit, 3d ed., pp. 48, 98, 105, 107, 108, 313, 316; Foster's Federal Practice, 5th ed., pp. 182, 577.)

§ 63. Nonlocal Suits Where District Contains More Than One Division—Criminal Cases—Transfer.

§ *53, Jud. Code.* "When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division. All mesne and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district, or if the state contains more than one district, then in any of such districts, as provided in the preceding section. All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division to which the cause is so ordered transferred; and thereupon the cause shall be proceeded with in said division in the same manner as if the offense had been committed therein. In all cases of the removal of suits from the courts of a state to the district court of the United States such removal shall be to the United States district court in the division in which the county is situated from which the removal

is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of United States courts, shall be deemed to refer to the terms of the United States district court in such division." (5 Fed. Stats. Ann., 2d ed., p. 520; 1 U. S. Comp. Stats. 1916, § 1035, p. 1161; Simkins' Federal Equity Suit, 3d ed., pp. 48, 108, 134, 333, 313, 316; Foster's Federal Practice, 5th ed., p. 577.)

§ 64. Local Suits With Defendant in Another District Same State.

§ *54, Jud. Code* (*Re-enacting* § *741, Rev. Stats.*). "In suits of a local nature, where the defendant resides in a different district, in the same state, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides." (5 Fed. Stats. Ann., 2d ed., p. 523; 1 U. S. Comp. Stats. 1916, § 1036, p. 1163; Simkins' Federal Equity Suit, 3d ed., pp. 49, 100, 313, 316; Foster's Federal Practice, 5th ed., pp. 208, 577.)

§ 65. Local Suits With Subject Matter Lying Partly in One District and Partly in Another.

§ *55, Jud. Code* (*Re-enacting* § *742, Rev. Stats.*). "Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in the district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted." (5 Fed. Stats. Ann., 2d ed., p. 523; 1 U. S. Comp. Stats. 1916, § 1037, p. 1164; Simkins' Federal Equity Suit, 3d ed., pp. 100, 313, 316; Foster's Federal Practice, 5th ed., pp. 182, 210, 577.)

§ 66. Liens—Clouds on Title—Absent Defendant.

§ *57, Jud. Code* (*Old* §§ *738, 742, Rev. Stats.*). "When in any suit commenced in any district court of the United States

to enforce any legal or equitable lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, whenever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same state, such suit may be brought in either district in said state: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law." (5 Fed. Stats. Ann., 2d ed., p. 525; 1

U. S. Comp. Stats. 1916, § 1039, p. 1165; Simkins' Federal Equity Suit, 3d ed., pp. 48, 49, 102, 103, 237, 336, 337; Foster's Federal Practice, 5th ed., pp. 185, 599.)

§ 67. Receiver's Jurisdiction Over Real Property in Other Districts in Circuit.

§ *56, Jud. Code (New).* "Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different states in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days thereafter, by the circuit court of appeals for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing and entering in the district court for each district of the circuit in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and of the order of appointment. The disapproval of such appointment within such thirty days, or the failure to file such certified copy of the bill and order of appointment within ten days, as herein required, shall devest such receiver of jurisdiction over all such property except that portion thereof lying or being within the state in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be." (5 Fed. Stats. Ann., 2d ed., p. 524; 1 U. S. Comp. Stats. 1916, § 1038, p. 1164; Foster's Federal Practice, 5th ed., pp. 211, 577, 953, 957.)

§ 68. Transfer to Another Division on Stipulation.

§ *58, Jud. Code (Drawn from 24 Stats. 425; 34 Stats. 206).* "Any civil cause, at law or in equity, may, on written stipu-

lation of the parties or of their attorneys of record signed and filed with the papers in the case, in vacation or in term, and on the written order of the judge signed and filed in the case in vacation or on the order of the court duly entered of record in term, be transferred to the court of any other division of the same district, without regard to the residence of the defendants, for trial. When a cause shall be ordered to be transferred to a court in any other division, it shall be the duty of the clerk of the court from which the transfer is made to carefully transmit to the clerk of the court to which the transfer is made the entire file of papers in the cause and all documents and deposits in his court pertaining thereto, together with a certified transcript of the records of all orders, interlocutory decrees, or other entries in the cause; and he shall certify, under the seal of the court, that the papers sent are all which are on file in said court belonging to the cause; for the performance of which duties said clerk so transmitting and certifying shall receive the same fees as are now allowed by law for similar services, to be taxed in the bill of costs, and regularly collected with the other costs in the cause; and such transcript, when so certified and received, shall henceforth constitute a part of the record of the cause in the court to which the transfer shall be made. The clerk receiving such transcript and original papers shall file the same and the case shall then proceed to final disposition as other cases of a like nature." (5 Fed. Stats. Ann., 2d ed., p. 537; 1 U. S. Comp. Stats. 1916, § 1040, p. 1180; Simkins' Federal Equity Suit, 3d ed., pp. 108, 134.)

§ 69. On Creation of New District or Division or Transfer of Territory.

§ *59, Jud. Code.* "Whenever any new district or division has been or shall be established, or any county or territory has been or shall be transferred from one district or division to another district or division, prosecutions for crimes and offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the

cause to be removed to the new district or division for trial. Civil actions pending at the time of the creation of any such district or division, or the transfer of any such county or territory, and arising within the district or division so created or the county or territory so transferred, shall be tried in the district or division as it existed at the time of the institution of the action, or in the district or division so created, or to which the county or territory is or shall be so transferred, as may be agreed upon by the parties, or as the court shall direct. The transfer of such prosecutions and actions shall be made in the manner provided in the section last preceding." (5 Fed. Stats. Ann., 2d ed., p. 538; 1 U. S. Comp. Stats. 1916, § 1041, p. 1180.)

§ 70. Same—Preservation and Enforcement of Liens.

§ *60, Jud. Code (Embracing 24 Stats. 309, and 31 Stats. 881).* "The creation of a new district or division, or the transfer of any county or territory from one district or division to another district or division, shall not affect or devest any lien theretofore acquired in the circuit or district court by virtue of a decree, judgment, execution, attachment, seizure, or otherwise, upon property situated or being within the district or division so created, or the county or territory so transferred. To enforce any such lien, the clerk of the court in which the same is acquired, upon the request and at the cost of the party desiring the same, shall make a true and certified copy of the record thereof, which, when so made and certified, and filed in the proper court of the district or division in which such property is situated or shall be, after such transfer, shall constitute the record of such lien in such court, and shall be evidence in all courts and places equally with the original thereof; and thereafter like proceedings shall be had thereon, and with the same effect, as though the cause or proceeding had been originally instituted in such court. The provisions of this section shall apply not only in all cases where a district or division is created, or a county or any territory is transferred by this or any future act, but also in all cases where a district or division has been created, or a county or any territory has been transferred by any law heretofore enacted." (5 Fed. Stats. Ann., 2d ed., p. 538; 1 U. S. Comp. Stats. 1916, § 1042, p. 1181.)

§ 71. Infringement of Letters Patent.

§ *48, Jud. Code* (*Re-enacting 29 Stats. 695*). "In suits brought for the infringement of letters patent the district courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought." (5 Fed. Stats. Ann., 2d ed., p. 478; 1 U. S. Comp. Stats. 1916, § 1030, p. 1105; Foster's Federal Practice, 5th ed., p. 184.)

§ 72. Under Copyright Laws.

§ *35, Act March 4, 1909, c. 320.* "That civil actions, suits, or proceedings arising under this Act may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found." (2 Fed. Stats. Ann., 2d ed., p. 593; 9 U. S. Comp. Stats. 1916, § 9556, p. 10,994.)

§ 73. To Enjoin Comptroller of Currency.

§ *49, Jud. Code* (*Re-enacting § 736, Rev. Stats.*). "All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located." (5 Fed. Stats. Ann., 2d ed., p. 482; 1 U. S. Comp. Stats. 1916, § 1031, p. 1109; Simkins' Federal Equity Suit, 3d ed., p. 145; Foster's Federal Practice, 5th ed., p. 187.)

§ 74. Part of Several Defendants not Found.

§ *50, Jud. Code* (*Re-enacting § 737, Rev. Stats.*). "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not

voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and nonjoinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit." (5 Fed. Stats. Ann., 2d ed., p. 482; 1 U. S. Comp. Stats. 1916, § 1032, p. 1109; Simkins' Federal Equity Suit, 3d ed., p. 101.)

§ 75. Crimes and Offenses.

Capital offenses.

§ *40, Jud. Code* (*Re-enacting* § *729, Rev. Stats.*). "The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience." (5 Fed. Stats. Ann., 2d ed., p. 467; 1 U. S. Comp. Stats. 1916, § 1022, p. 1092; Foster's Federal Practice, 5th ed., p. 1723.)

Committed on high seas or outside state jurisdiction.

§ *41, Jud. Code* (*Re-enacting* § *730, Rev. Stats.*). "The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought." (5 Fed. Stats. Ann., 2d ed., p. 468; 1 U. S. Comp. Stats. 1916, § 1023, p. 1092; Foster's Federal Practice, 5th ed., p. 1724.)

Committed in two districts.

§ *42, Jud. Code* (*Re-enacting* § *731, Rev. Stats.*). "When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein." (5 Fed. Stats. Ann., 2d ed., p. 470; 1 U. S. Comp. Stats. 1916, § 1024, p. 1096; Foster's Federal Practice, 5th ed., p. 1723; Hyde & Schneider v. United States, 225 U. S. 347, 56 **L. Ed.** 1114, 32 Sup. Ct. 793.)

Sale of arms and intoxicants in Pacific Islands deemed on high seas.

§ *309, Crim. Code* (*Drawn from 32 Stats. 33*). "All offenses against the provisions of the section last preceding (§ 308 Crim. Code), committed on any of said islands or on the waters, rocks, or keys adjacent thereto, shall be deemed committed on the high seas on board a merchant ship or vessel belonging to the United States, and the courts of the United States shall have jurisdiction accordingly." (Fed. Stats. Ann., 2d ed., "Penal Laws"; 10 U. S. Comp. Stats. 1916, § 10,482, p. 12,928.)

Vessel defined.

§ *310, Crim. Code* (*New*). "The words, 'vessel of the United States,' wherever they occur in this chapter, shall be construed to mean a vessel belonging in whole or in part to the United States, or any citizen thereof, or any corporation created by or under the laws of the United States, or of any state, territory, or district thereof." (Fed. Stats. Ann., 2d ed., "Penal Laws"; 10 U. S. Comp. Stats. 1916, § 10,483, p. 12,928.)

§ 76. Penalties and Forfeitures.

Pecuniary penalties and forfeitures.

§ *43, Jud. Code* (*Re-enacting § 732, Rev. Stats.*). "All pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found." (5 Fed. Stats. Ann., 2d ed., p. 475; 1 U. S. Comp. Stats. 1916, § 1025, p. 1102.)

Seizures made on high seas for forfeitures.

§ *45, Jud. Code* (*Re-enacting § 734, Rev. Stats.*). "Proceedings on seizures made on the high seas, for forfeiture under any law of the United States, may be prosecuted in any district into which the property so seized is brought and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided." (5 Fed. Stats. Ann., 2d ed., p. 476; 1 U. S. Comp. Stats. 1916, § 1027, p. 1102; Foster's Federal Practice, 5th ed., p. 188.)

§ 77. Taxes and Internal Revenue.

§ *44, Jud. Code* (*Re-enacting* § *733, Rev. Stats.*). "Taxes accruing under any law providing internal revenue may be sued for and recovered either in the district where the liability for such tax occurs or in the district where the delinquent resides." (5 Fed. Stats. Ann., 2d ed., p. 476; 1 U. S. Comp. Stats. 1916, § 1026, p. 1102.)

§ 78. Condemnation Insurrectionary Property.

§ *46, Jud. Code* (*Re-enacting* § *735, Rev. Stats.*). "Proceedings for the condemnation of any property captured, whether on the high seas or elsewhere out of the limits of any judicial district, or within any district, on account of its being purchased or acquired, sold or given, with intent to use or employ the same, or to suffer it to be used or employed, in aiding, abetting, or promoting any insurrection against the government of the United States, or knowingly so used or employed by the owner thereof, or with his consent, may be prosecuted in any district where the same may be seized, or into which it may be taken and proceedings first instituted." (5 Fed. Stats. Ann., 2d ed., p. 477; 1 U. S. Comp. Stats. 1916, § 1028, p. 1104; Simkins' Federal Equity Suit, 3d ed., p. 131; Foster's Federal Practice, 5th ed., p. 188.)

§ 79. Seizures for Forfeiture—Embargo or Insurrection.

§ *47, Jud. Code* (*Re-enacting* § *564, Rev. Stats.*). "Proceedings on seizures for forfeiture of any vessel or cargo entering any port of entry which has been closed by the President in pursuance of law, or of goods and chattels coming from a state or section declared by proclamation of the President to be in insurrection into other parts of the United States, or of any vessel or vehicle conveying such property, or conveying persons to or from such state or section, or of any vessel belonging, in whole or in part, to any inhabitant of such state or section, may be prosecuted in any district into which the property so seized may be taken and proceedings instituted; and the district court thereof shall have as full jurisdiction over such proceedings as if the seizure was made in that district." (5 Fed. Stats. Ann. 2d ed., pp. 477, 478,

1 U. S. Comp. Stats. 1916, § 1029, p. 1104; Foster's Federal Practice, 5th ed., p. 188.)

§ 80. Prosecutions for Failure to File Tariffs, Giving Rebates, etc.

Part § 1, Act Feb. 19, 1903, c. 708, as amended § 2, Act June 29, 1906, c. 3591. "Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein." (4 Fed. Stats. Ann., 2d ed., pp. 549, 550; 8 U. S. Comp. Stats. 1916, § 8597, p. 9265.)

It is sufficient to sustain the jurisdiction of a court that the shipments with respect to which it is charged that rebates were granted were transported into the district, and such jurisdiction is not defeated by the fact that the arrangement was made, or the rebates paid or settled for, in another district. (Northern Central Ry. Co. v. United States, 241 Fed. 25.)

§ 81. Prosecutions for Violations of the Sixteen Hour Law.

Part § 3, Act March 4, 1907, c. 2939, as amended by § 1, Act May 4, 1916, c. 109. Prosecutions to be brought "in the district court of the United States having jurisdiction in the locality where such violations shall have been committed." (Fed. Stats. Ann., 2d ed., "Railroads"; 8 U. S. Comp. Stats. 1916, § 8679, p. 9455.)

§ 82. Suits Affecting Orders of Interstate Commerce Commission.

Part Act October 22, 1913, c. 32. "The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission

shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment, the term 'destination' shall be construed as meaning final destination of such shipment." (5 Fed. Stats. Ann., 2d ed., p. 1108; 1 U. S. Comp. Stats. 1916, § 994, p. 833.)

On reversal of commerce court, the supreme court will remand to the district court. (The Los Angeles Switching Case, 234 U. S. 294, 58 **L. Ed.** 1319, 34 Sup. Ct. 814.)

For payment of money.

§ 16, Act of February 4, 1887, c. 104, as amended § 5, Act March 2, 1889, c. 382, and § 5, Act June 29, 1906, c. 3591, and § 13, Act June 18, 1910, c. 309. Suits to enforce payment of money may be brought in the district court "for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, . . . " (4 Fed. Stats. Ann., 2d ed., p. 476; 8 U. S. Comp. Stats. 1916, § 8584, pt. (2), p. 9222.)

§ 83. Prosecutions for Injuries to Fortifications.

Part § 44, Crim. Code, as amended Act March 4, 1917, c. 180. " . . . shall be punished on conviction thereof in a district or circuit court of appeals of the United States for the district or circuit in which the offense is committed, or into which the offender is first brought, by a fine of not more than $5,000, or by imprisonment for a term not exceeding five years, or by both, in the discretion of the court." (Fed. Stats. Ann., 2d ed., title "Penal Laws," Pamphlet Supp., Nos. 9–10, p. 73; U. S. Comp. Stats. 1916, § 10,208.)

§ 44, Crim. Code, as amended § 19, Act of May 22, 1917, by adding: "Provided, That offenses hereunder committed within the Canal Zone or within any defensive sea areas which the President is authorized to establish by said section, shall be cognizable in the District Court of the Canal Zone, and jurisdiction is hereby conferred upon said court to hear and determine all such cases arising under said section and to impose the penalties therein provided for the violation of any of the provisions of said section." (Fed. Stats. Ann., 2d ed., title "Penal Laws," Pamphlet Supp., No. 11, pp. 55–56; U. S. Comp. Stats. 1916, § 10,208; Adv. Sheets, 241 Fed. 215.)

§ 84. Prosecutions of Offenses Against the Postal Laws in Selling Intoxicating Liquors. The venue of prosecutions for using the mails for advertisements, etc., of intoxicating liquors intended for prohibition states is designated as follows:

Part § 5, Act March 3, 1917, c. 162. " . . . Any person violating any provision of this section may be tried and punished, either in the district in which the unlawful matter or publication was mailed or to which it was carried by mail for delivery, according to direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed." (Fed. Stats. Ann., 2d ed., title "Intoxicating Liquors," Pamphlet Supp., Nos. 9–10, p. 62; U. S. Comp. Stats. 1916, § 10,387b.)

§ 85. Prosecutions for Violations of Immigration Laws.

Part § 25, Act February 15, 1917, c. ——. " . . . Such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with such violation may be found. . . . " (Pamphlet Supp., Fed. Stats. Ann., 2d ed., Nos. 9–10, p. 50, title, "Immigration.")

§ 86. Issue of Venue — How Raised. Objections as to the venue of actions must be raised at the earliest possible moment, as this is a personal privilege, and may be waived by the defendant's failure to seasonably object.

In cases of removal the question of venue may be important in determining whether or not the suit was one of which the district court had original jurisdiction. But the defect will be waived if not put in issue by the plaintiff in his motion to remand. The filing of petition and bond for removal is a waiver by the defendant. The issue should be raised in the motion to remand. (In re Moore, 209 U. S. 490, 14 **Ann. Cas.** 1164, 52 **L. Ed.** 904, 28 Sup. Ct. 706, cited in American Oil & Supply Co. v. Western Gas Const. Co. [2d Cir.], 239 Fed. 506.)

If a suit is originally brought in the federal court and it is not brought in the district of which the defendant is an inhabitant (except in the special cases heretofore indicated), or if, in case of diversity of citizenship, the suit is not brought in the residence district of the plaintiff or defendant, the issue as to venue would be raised in a suit in equity under Rule 29 by motion to dismiss. The motion to dismiss should be confined to that special ground, otherwise it may amount to a waiver. (Alder Goldman Commission Co. v. Williams, 211 Fed. 530.)

In a suit at law the issue would be raised in that form of pleading used to raise jurisdictional questions in the state court of record of the state wherein the district is situated. Generally the pleading would be a demurrer for defects apparent on the face of the record.

For a motion to dismiss, the following form is suggested:

"In the District Court of the United States for the —— District of ——, —— Division.

John Doe,
Plaintiff,
vs.
Richard Roe,
Defendant.

MOTION TO DISMISS.

Now comes the defendant in the above-entitled action and moves the court to dismiss same at plaintiff's costs on the ground that, as appears on the face of the bill, at the commencement of this action defendant was not, and is not now, an inhabitant of, nor residing in the —— district of

——, where this suit is brought, but that at the commencement of this action and now, defendant was, and is, an inhabitant of, and resides in —— county which is in the —— district of the state of —— and not the district where this suit is brought.

——,
Solicitor."

If the objection be that he is not sued in the proper division of the district, the word "division" may be substituted for district in the above form.

In case of a corporation, the allegation may be:

"That it is not an inhabitant of or residing in the —— county of ——, district of ——, but is an inhabitant of and residing in —— county in the —— district of ——, where its principal office or headquarters are situated, its corporate meetings held and its corporate business transacted.

If the bill has the necessary allegations as to citizenship, which may not be true, the issue may be raised in the answer under Equity Rule 29.

"In the District Court of the United States in the —— District of ——,
—— Division.

John Doe,
Plaintiff,
vs.
Richard Roe,
Defendant.

ANSWER.

Defendant answering plaintiff's complaint alleges:

As a separate defense, denies that defendant at the commencement of this suit was or is now an inhabitant of or resident of the —— division of —— where this suit is brought, but alleges that at the commencement of the suit defendant was and now is an inhabitant of ——, and resides in —— county, which is in the —— district of the state of ——, and, therefore, this action is not properly within the jurisdiction of this court. . . . "

CHAPTER 5.

DISTRICT COURT'S JURISDICTION.

SEC.

90. In General.
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107. Power to Enforce Foreign Consular Awards.
108. Powers of Foreign Consuls Over Disputes Between Seamen.
109. Arrest of Seamen on Application of Consul.
110. Commitment and Discharge.
111. Jurisdiction in Cases Transferred from Territorial Courts.
112. Jurisdiction Under Reclamation Act.
113. Jurisdiction Under Income Tax Law.
114. Jurisdiction in Arbitration of Disputes Between Common Carriers and Employees.

§ 90. In General. Although the jurisdiction of the federal courts is limited, the number and importance of cases involving some ground of federal jurisdiction is considerable and is constantly increasing.

By the Judicial Code which took effect January 1, 1912, the United States circuit courts were abolished and the district courts were made the federal courts of general, original jurisdiction.

As one or more of these federal district courts is located in every state in the United States, the general practitioner should

be concerned with the scope of its jurisdiction and mode of procedure. The reasons why a practitioner should be familiar with federal jurisdiction and procedure are as follows: (1) such court may be available to him as the best or most convenient court in which to bring a suit; (2) the trial of a case brought by him in the state court may be prevented by his adversary's removal of the case to the federal court; (3) on account of the locality or bias of a state court, the practitioner may find it desirable to remove the suit for a defendant to the federal court; (4) he may be called upon to defend a suit brought in the federal court; (5) he may be employed to pass upon a title litigated in the federal courts.

The original jurisdiction of the federal district court is set out in § 24, Jud. Code (§ 94 below), part of which is made exclusive by § 256, Jud. Code (§ 92 below), and part by other provisions (§ 91 following), the remainder being concurrent with that of state courts of record in the various states (§ 93 below).

Under § 24, Jud. Code, the jurisdiction of the district courts is limited to cases involving a federal question (chapter 6, *post*), or diverse citizenship (chapter 7, *post*), also with respect to the amount in controversy (chapter 8, *post*), and the denial of the right of certain assignees to sue unless their assignors could have brought the suits in the federal courts (§ 97 below).

Considerable volume of business comes into the federal district courts through its jurisdiction on removal of cases from the state courts. This jurisdiction on removal under § 28 et seq., Jud. Code, is limited to those cases of concurrent jurisdiction of which the district court has *original jurisdiction*. This subject is treated in a separate chapter, chapter 9, entitled, "Removal of Causes—Jurisdiction and Procedure."

Under special provisions of the federal statutes giving jurisdiction to the United States courts, several include the United States district court.

The United States district court has jurisdiction of various matters under the titles, "Agriculture" (§ 98, *infra*), "Alien Enemies" (§ 99, *infra*), "Arbitration Disputes, Common Carriers

"Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice consuls." (5 Fed. Stats. Ann., 2d ed., p. 921; 2 U. S. Comp. Stats. 1916, § 1233, p. 1841; Foster's Federal Practice, 5th ed., pp. 16, 21; Simkins' Federal Equity Suit, 3d ed., pp. 41, 47.)

§ 93. District Court—Jurisdiction Concurrent With that of State Courts—Amount in Controversy. The federal district courts also have an extensive jurisdiction which is not exclusive but *concurrent with that of the state courts* of record in the various states where the several districts lie.

Cases where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and involving either a federal question or diverse citizenship, may be brought either in the federal district court of the proper district, or on proper proceedings may be removed thereto from state court wherein such district is located. The amount in controversy is not material under subdivisions second to twenty-fifth, inclusive, § 24, Jud. Code, quoted in full below, § 94.

§ 94. Original Jurisdiction.

§ *24, Jud. Code* (*Drawn from* § *563, Rev. Stats.*). "The district courts shall have original jurisdiction as follows:—

"First. (Where the United States are plaintiffs; and of civil suits at common law or in equity.) Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states; or where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other

chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: *Provided, however,* That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.

"Second. (Of crimes and offenses.) Of all crimes and offenses cognizable under the authority of the United States.

"Third. (Of admiralty causes, seizures, and prizes.) Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

"Fourth. (Of suits under any law relating to the slave trade.) Of all suits arising under any law relating to the slave trade.

"Fifth. (Of cases under internal revenue, customs, and tonnage laws.) Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the court of customs appeals.

"Sixth. (Of suits under postal laws.) Of all cases arising under the postal laws.

"Seventh. (Of suits under the patent, the copyright, and the trademark laws.) Of all suits at law or in equity arising under the patent, the copyright, and the trademark laws.

"Eighth. (Of suits for violation of interstate commerce laws.) Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the commerce court. (Commerce court now abolished and jurisdiction transferred to district court. See ch. 9 of the Judicial Code, in our Appendix.)

"Ninth. (Of penalties and forfeitures.) Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States.

"Tenth. (Of suits on debentures.) Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

"Eleventh. (Of suits for injuries on account of acts done under laws of the United States.) Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several states.

"Twelfth. (Of suits concerning civil rights.) Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, Revised Statutes.

"Thirteenth. (Of suits against persons having knowledge of conspiracy, etc.) Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, Revised Statutes, are about to be done, and having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act.

"Fourteenth. (Of suits to redress the deprivation, under color of law, of civil rights.) Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

"Fifteenth. (Of suits to recover certain offices.) Of all suits to recover possession of any office, except that of elector

of President or Vice President, Representative in or delegate to Congress, or member of a state legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: *Provided,* That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the states.

"Sixteenth. (Of suits against national banking associations.) Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title, 'National Banks,' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purpose of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located.

"Seventeenth. (Of suits by aliens for torts.) Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States.

"Eighteenth. (Of suits against consuls and vice consuls.) Of all suits against consuls and vice consuls.

"Nineteenth. (Of suits and proceedings in bankruptcy.) Of all matters and proceedings in bankruptcy.

"Twentieth. (Of suits against the United States.) Concurrent with the court of claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable,

and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court: *Provided, however,* That nothing in this paragraph shall be construed as giving to either the district courts or the court of claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as 'war claims,' or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: *And provided, further,* That no suit against the government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That the claims of married women first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

"Twenty-first. (Of suits for the unlawful inclosure of public lands.) Of proceedings in equity, by writ of injunction, to restrain violations of the provisions of laws of the United States to prevent the unlawful inclosure of public lands; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure.

"Twenty-second. (Of suits under immigration and contract labor laws.) Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws.

"Twenty-third. (Of suits against trusts, monopolies, and unlawful combinations.) Of all suits and proceedings arising under any law to protect trade and commerce against restraint and monopolies.

"Twenty-fourth. (Of suits concerning allotments of land to Indians.) Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty. And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands now or heretofore held by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency: *Provided,* That the right of appeal shall be allowed to either party as in other cases. (Subd. 24 as amended act Dec. 21, 1911, ch. 5, 37 Stats. at L. 46.)

"Twenty-fifth. (Of partition suits where United States is joint tenant.) Of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situate."

(4 Fed. Stats. Ann., 2d ed., pp. 838–862; 1 U. S. Comp. Stats. 1916, § 991, p. 552; Simkins' Federal Equity Suit, 3d ed., pp. 41, 42, 47, 63, 87, 91, 95, 168, 210, 317, 775, 809, 812, 815, 824, 828, 834; Foster's Federal Practice, 5th ed., pp. 18, 22, 122, 184, 199, 367, 379, 380, 642, 1524, 1932, 2012.)

§ 95. Original Jurisdiction—Interpleader of Insurance Companies.

Act Feb. 22, 1917, c. 113. (Original jurisdiction; bills of interpleader filed by insurance companies, etc.; process; hearing; orders and decrees; district in which bills shall be filed.)

"The district courts of the United States shall have original cognizance to entertain suits in equity begun by bills of interpleader where the same are filed by any insurance company or fraternal beneficiary society, duly verified, and where it is made to appear by such bill that one or more persons, being bona fide claimants against such company or society, reside within the jurisdiction of said court; that such company or society has made or issued some policy of insurance or certificate of membership providing for the payment of a sum of money of at least $500 as insurance or benefits to a beneficiary or beneficiaries or to the heirs, next of kin, or legal representative of the person insured or member; that two or more adverse claimants, citizens of different States, are claiming or may claim to be entitled to such insurance or benefits and that such company or society deposits the amount of such insurance or benefits with the clerk of said court and abide the judgment of said court. In all such cases the court shall have the power to issue its process for said claimants, returnable at such time as the said court or a judge thereof shall determine, which shall be addressed to and served by the United States marshals for the respective districts wherein said claimants reside or may be found; to hear said bill of interpleader and decide thereon according to the practice in equity; to discharge said complainant from further liability upon the payment of said insurance or benefit as directed by the court, less complainant's actual court costs; and shall have the power to make such orders and decrees as may be suitable and proper and to issue the necessary writs usual and customary in such cases for the purpose of carrying out such orders and decrees: 'Provided, That in all cases where a beneficiary or beneficiaries are named in the policy of insurance or certificate of membership or where the same has been assigned and written notice thereof shall have been given to the insurance company or fraternal benefit society, the bill of interpleader shall be filed in the district where the beneficiary or beneficiaries may reside.'" (Pamphlet Supp. Fed. Stats. Ann. Nos. 9–10, p. 65; U. S. Comp. Stats. 1916, § 991a, Advance Sheets, 239 Fed. No. 1, p. 56.)

§ 96. Jurisdiction — Prosecution — Violation of Immigration Laws.

Part § 25, Act Feb. 15, 1917, c. ——. "That the district courts of the United States are hereby invested with full jurisdiction of all causes, civil and criminal, arising under any of the provisions of this Act. That it shall be the duty of the United States district attorney of the proper district to prosecute every such suit when brought by the United States under this act. . . ." (Pamphlet Supp. Fed. Stats. Ann. Nos. 9–10, p. 50, "Immigration.")

§ 97. Jurisdiction by Assignment.[12] In the latter part of subdivision first, § 24, Jud. Code, quoted in full § 94, *supra*, it is provided as follows:

"No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

The purpose of this provision is to prevent the conferring of jurisdiction on the district courts by fraudulent assignments creating an apparent diversity of citizenship.[13]

The exceptions permitting assignees to bring suit are: 1st, Suits upon foreign bills of exchange; 2d, suits that might have been prosecuted in such courts if no assignment had been made; 3d, suits upon choses in action made by a corporation payable to bearer.[14]

An action in equity by the assignee of an oil and gas lease to restrain others from operating the land for oil and gas is not

12 See note 4 Fed. Stats. Ann., 2d ed., pp. 974–988; 1 U. S. Comp. Stats. 1916, pp. 715–732; Simkins' Federal Equity Suit, 3d ed., pp. 209–223.

13 See Barclay v. Levee Commissioners, 1 Woods (U. S.), 254, 2 Fed. Cas. No. 997.

14 See Newgass v. New Orleans, 33 Fed. 196, 198; Wilson v. Knox County, 43 Fed. 481; New Orleans v. Quinlan, 173 U. S. 191, 43 L. Ed. 664, 19 Sup. Ct. 329; Quinlan v. New Orleans, 92 Fed. 695; Skinner v. Bar, 77 Fed. 816.

a suit to recover upon a chose in action as an assignee within this provision. (Shaffer v. Marks, 241 Fed. 139.)

Another exception is where the assignor is merely the nominal owner.[15] The objection may be raised at any time.[16]

The matter being jurisdictional, where the citizenship of the original payee is material, it should be shown in the bill, distinctly alleged, and not by inference. The form of allegation may be as follows:

"John Doe, plaintiff, alleges that at all times since the assignment to him of the within cause of action, he was and is a citizen of the state of ——, and a resident of the county of —— in said state; that his assignor, Henry Smith, at all times hereinafter mentioned was and is a citizen of the state of —— and a resident of the county of —— in said state, and competent to have prosecuted in this court a suit upon the cause of action herein set out if no assignment had been made; that defendant, Richard Roe, at all times hereinafter mentioned, was and is a citizen of the state of —— residing in said county of said state."

It is not enough to allege in the complaint that the assignor was a citizen of a different state from defendant, but there must be shown diverse citizenship of the assignor and the defendant at the time of bringing the suit.[17]

In order to remove a case from a state to the federal court, the bill filed in the state court must show proper citizenship of the assignors.[18]

Objection may be made by motion to dismiss if the defect appears on the face of the complaint, or in the answer, under Equity Rule 29, in equity suits; or in an action at law by an appropriate form of state pleading provided to raise jurisdictional points. The following is suggested as matter to be incorporated in whatever form of pleading is used to raise the objection:

"Defendant further alleges that the bill of complaint shows that plaintiff derives title and right to sue through an assignment from Henry Smith, that said Henry Smith was and is now a citizen of the state of ——; and,

15 Kirven v. Virginia Carolina Chemical Co., 145 Fed. 288, 7 Ann. Cas. 219, 76 C. C. A. 172.

16 Utah-Nevada Co. v. De Lamar, 133 Fed. 113, 66 C. C. A. 179.

17 Benjamin v. City of New Orleans, 71 Fed. 758; same case circuit court of appeals, 74 Fed. 417, 20 C. C. A. 591.

18 Simkins' Federal Equity Suit, 3d ed., p. 221.

therefore, that there is no diversity of citizenship on which to base the jurisdiction of this court in this suit."

§ 98. Agriculture.

§ *5, Act of April 26, 1910, c. 191.* "That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act, or to whom any director of experiment station or agent of any state, territory, or the District of Columbia, under authority of the Secretary of Agriculture, shall present satisfactory evidences of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided." (36 Stats. 332; 1 Fed. Stats. Ann., 2d ed., p. 222; 8 U. S. Comp. Stats. 1916, § 8769.)

§ 99. Alien Enemies.

§ *4069, Rev. Stats.* "After any such proclamation has been made, the several courts of the United States having criminal jurisdiction, and the several justices and judges of the courts of the United States, are authorized, and it shall be their duty, upon complaint against any alien enemy resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established, to cause such alien to be duly apprehended and conveyed before such court, judge or justice; and after a full examination and hearing on such complaint, and sufficient cause appearing, to order such alien to be removed out of the territory of the United States, or to give sureties for his good behavior, or to be otherwise restrained, conformably to the proclamation or regulations established as aforesaid, and to imprison or otherwise secure such alien, until the order which may be so made shall be performed." (1 Fed. Stats. Ann., 2d ed., p. 365; 7 U. S. Comp. Stats. 1916, § 7617.)

§ 100. Same—Duties of Marshal.

§ *4070, Rev. Stats.* "When an alien enemy is required by the President, or by order of any court, judge, or justice, to

depart and to be removed, it shall be the duty of the marshal of the district in which he shall be apprehended to provide therefor, and to execute such order in person, or by his deputy, or other discreet person to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of the President, or of the court, judge, or justice ordering the same, as the case may be." (1 Fed. Stats. Ann., 2d ed., p. 365; 7 U. S. Comp. Stats. 1916, § 7618.)

§ 101. Customs Duties.

§ 3, Act June 10, 1910, c. 283. "That any licensed custom-house broker aggrieved by the decision of the Secretary of the Treasury may, within thirty days thereafter, and not afterwards, apply to the United States circuit court for the circuit in which the collection district is situated for a review of such decision. Such application shall be made by filing in the office of the clerk of said court a petition praying relief in the premises. Thereupon the court shall immediately give notice in writing of such application to the Secretary of the Treasury, who shall forthwith transmit to said court the record and evidence taken in the case, together with a statement of his decision therein. The filing of such application shall operate as a stay of the revocation of the license. The matter may be brought on to be heard before the said court in the same manner as a motion, by either the United States district attorney or the attorney for the custom-house broker, and the decision of said United States circuit court for the circuit in which the collection district is situated shall be upon the merits as disclosed by the record and be final, and the proceedings remanded to the Secretary of the Treasury for further action to be taken in accordance with the terms of the decree. (36 Stats. 465; 2 Fed. Stats. Ann., 2d ed., p. 1008; 6 U. S. Comp. Stats. 1916, § 5552.)

See subd. 5, § 24, Jud. Code, quoted § 94 above, giving the district court original jurisdiction of cases arising under the customs laws.

§ 102. Rivers, Harbors and Canals — Actions to Remove Obstructions.

Part § 5, Act June 21, 1906, c. 3508, as amended Act June 23, 1910, c. 360. "And the removal of any structures erected or maintained in violation of the provisions of this act or the order or direction of the Secretary of War or the Chief of Engineers made in pursuance thereof may be enforced by injunction, *mandamus,* or other summary process, upon application to the circuit court in the district in which such structure may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States at the request of the Chief of Engineers or the Secretary of War; and in case of any litigation arising from any obstruction or alleged obstruction to navigation created by the construction of any dam under this act the cause or question arising may be tried before the circuit court of the United States in any district in which any portion of said obstruction or dam touches." (Fed. Stats. Ann., 2d ed., title "Rivers, Harbors and Canals"; 10 U. S. Comp. Stats. 1916, § 9980, p. 12,277.)

§ 103. White Slave Traffic.

§ 5, Act June 25, 1910, c. 395. "That any violation of any of the above sections two, three, and four shall be prosecuted in any court having jurisdiction of crimes within the district in which said violation was committed, or from, through, or into which any such woman or girl may have been carried or transported as a passenger in interstate or foreign commerce, or in any territory, or the District of Columbia, contrary to the provisions of any of said sections." (36 Stats. 826; Fed. Stats. Ann., 2d ed., title "White Slave Traffic"; 8 U. S. Comp. Stats. 1916, § 8816.)

§ 104. Appellate Jurisdiction Chinese Exclusion Laws.

§ 25, Jud. Code (Drawn from Act Sept. 13, 1888, c. 1013, § 13). "The district courts shall have appellate jurisdiction of the judgments and orders of United States commissioners in cases arising under the Chinese exclusion laws." (4 Fed. Stats. Ann., 2d ed., p. 1063; 1 U. S. Comp. Stats. 1916, § 1007; Foster's Federal Practice, 5th ed., pp. 20, 2414, 2418.)

§ 105. Appellate Jurisdiction Yellowstone National Park.

§ *26, Jud. Code* (*Re-enacting Act May 7, 1894, c. 72*). "The district court for the district of Wyoming shall have jurisdiction of all felonies committed within the Yellowstone National Park, and appellate jurisdiction of judgments in cases of conviction before the commissioner authorized to be appointed under section five of an act entitled, 'An Act to Protect the Birds and Animals in Yellowstone National Park, and to Punish Crimes in Said Park, and for Other Purposes,' approved May seventh, eighteen hundred and ninety-four." (4 Fed. Stats. Ann., 2d ed., p. 1063; 1 U. S. Comp. Stats. 1916, § 1008; Foster's Federal Practice, 5th ed., pp. 21, 263, 2420.)

§ 106. Jurisdiction of Crimes on Indian Reservations South Dakota.

§ *27, Jud. Code* (*Re-enacting Act Feb. 2, 1903, c. 351*). "The district court of the United States for the district of South Dakota shall have jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, or assault with a dangerous weapon, committed within the limits of any Indian reservation in the state of South Dakota." (4 Fed. Stats. Ann., 2d ed., p. 1063; 1 U. S. Comp. Stats. 1916, § 1009; Foster's Federal Practice, 5th ed., p. 21.)

§ 107. Power to Enforce Foreign Consular Awards.

§ *271, Jud. Code* (*Re-enacting* § *728, Rev. Stats.*). "The district courts and the United States commissioners shall have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration or decree of any consul, vice consul, or commercial agent of any foreign nation, made or rendered by virtue of authority conferred on him as such consul, vice consul, or commercial agent, to sit as judge or arbitrator in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to his charge, application for the exercise of such power being first made to such court or commissioner, by petition of such consul, vice consul, or com-

mercial agent. And said courts and commissioners may issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration, or decree, and to enforce obedience thereto by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States, until such award, arbitration, or decree is complied with, or the parties are otherwise discharged therefrom, by the consent in writing of such consul, vice consul, or commercial agent, or his successor in office, or by the authority of the foreign government appointing such consul, vice consul, or commercial agent: *Provided, however,* That the expenses of the said imprisonment and maintenance of the prisoners, and the cost of the proceedings, shall be borne by such foreign government, or by its consul, vice consul, or commercial agent requiring such imprisonment. The marshals of the United States shall serve all such process, and do all other acts necessary and proper to carry into effect the premises under the authority of said courts and commissioners." (5 Fed. Stats. Ann., 2d ed., p. 1057; 2 U. S. Comp. Stats. 1916, § 1248; Foster's Federal Practice, 5th ed., p. 20.)

§ 108. Powers of Foreign Consuls Over Disputes Between Seamen.

§ *4079, Rev. Stats.* "Whenever it is stipulated by treaty or convention between the United States and any foreign nation that the consul general, consuls, vice consuls, or consular or commercial agents of each nation, shall have exclusive jurisdiction of controversies, difficulties, or disorders arising at sea or in the waters or ports of the other nation, between the master or officers and any of the crew, or between any of the crew themselves, of any vessel belonging to the nation represented by such consular officer, such stipulations shall be executed and enforced within the jurisdiction of the United States as hereinafter declared. But before this section shall take effect as to the vessels of any particular nation having such treaty with the United States, the President shall be satisfied that similar provisions have been made for the execution of such treaty by the other contracting party,

and shall issue his proclamation to that effect, declaring this section to be in force as to such nation." (3 Fed. Stats. Ann., 2d ed., p. 57; 7 U. S. Comp. Stats. 1916, § 7629.)

§ 109. Arrest of Seamen on Application of Consul.

§ *4080, Rev. Stats.* "In all cases within the purview of the preceding section the consul general, consul, or other consular or commercial authority of such foreign nation charged with the appropriate duty in the particular case, may make application to any court of record of the United States, or to any judge thereof, or to any commissioner of a circuit court, setting forth that such controversy, difficulty, or disorder has arisen, briefly stating the nature thereof, and when and where the same occurred, and exhibiting a certified copy or extract of the shipping articles, roll, or other proper paper of the vessel, to the effect that the person in question is of the crew or ship's company of such vessel; and further stating and certifying that such person has withdrawn himself, or is believed to be about to withdraw himself, from the control and discipline of the master and officers of the vessel, or that he has refused, or is about to refuse, to submit to and obey the lawful jurisdiction of such consular or commercial authority in the premises; and further stating and certifying that, to the best of the knowledge and belief of the officer certifying, such person is not a citizen of the United States. Such application shall be in writing and duly authenticated by the consular or other sufficient official seal. Thereupon such court, judge, or commissioner shall issue his warrant for the arrest of the person so complained of, directed to the marshal of the United States for the appropriate district, or in his discretion to any person, being a citizen of the United States, whom he may specially depute for the purpose, requiring such person to be brought before him for examination at a certain time and place." (3 Fed. Stats. Ann., 2d ed., p. 58; 7 U. S. Comp. Stats. 1916, § 7630.)

§ 110. Commitment and Discharge.

§ *4081, Rev. Stats.* "If, on such examination, it is made to appear that the person so arrested is a citizen of the United

States, he shall be forthwith discharged from arrest, and shall be left to the ordinary course of law. But if this is not made to appear, and such court, judge, or commissioner finds, upon the papers hereinbefore referred to, a sufficient *prima facie* case that the matter concerns only the internal order and discipline of such foreign vessel, or, whether in its nature civil or criminal, does not affect directly the execution of the laws of the United States, or the rights and duties of any citizen of the United States, he shall forthwith, by his warrant, commit such person to prison, where prisoners under sentence of a court of the United States may be lawfully committed, or, in his discretion, to the master or chief officer of such foreign vessel, to be subject to the lawful orders, control, and discipline of such master or chief officer, and to the jurisdiction of the consular or commercial authority of the nation to which such vessel belongs, to the exclusion of any authority or jurisdiction in the premises of the United States or any state thereof. No person shall be detained more than two months after his arrest, but at the end of that time shall be set at liberty and shall not again be arrested for the same cause. The expenses of the arrest and the detention of the person so arrested shall be paid by the consular officers making the application." (3 Fed. Stats. Ann., 2d ed., p. 59; 7 U. S. Comp. Stats. 1916, § 7631, p. 8143.)

So much of section 4081 of the Revised Statutes as relates to the arrest or imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of foreign nations in the United States and territories and possessions thereof, and for the co-operation, aid and protection of competent legal authorities in effecting such arrest or imprisonment, is repealed by § 17, Act March 4, 1915, c. 153, U. S. Comp. Stats. 1916, § 8382b, p. 8912.

§ 111. Jurisdiction in Cases Transferred from Territorial Courts.

§ *64, Jud. Code* (*Re-enacting substantially* § *569, Rev. Stats.*). "When any territory is admitted as a state, and a district court is established therein, the said district court shall take cognizance of all cases which were pending and

undetermined in the trial courts of such territory, from the judgments or decrees to be rendered in which writs of error could have been sued out or appeals taken to the Supreme Court or to the circuit court of appeals, and shall proceed to hear and determine the same." (5 Fed. Stats. Ann., 2d ed., p. 540; 1 U. S. Comp. Stats. 1916, § 1046.)

§ 112. Jurisdiction Under Reclamation Act.

§ *5, Act August 9, 1912, c. 278.* "That jurisdiction of suits by the United States for the enforcement of the provisions of this act is hereby conferred on the United States district courts of the districts in which the lands are situated." (Fed. Stats. Ann., 2d ed., title "Waters"; 5 U. S. Comp. Stats. 1916, § 4732.)

The United States by injunction may restrain the diversion of water. (U. S. v. Union Gap Irr. Co., 209 Fed. 274.)

§ 113. Jurisdiction Under Income Tax Law.

§ *20, Act Sept. 8, 1916, c. 463.* "That jurisdiction is hereby conferred on the district courts of the United States for the district within which any person summoned under this title to appear to testify or to produce books shall reside, to compel such attendance, production of books, and testimony by appropriate process. (Pamphlet Supp. Fed. Stats. Ann., 2d ed., title "Internal Revenue," No. 8, p. 97; 6 U. S. Comp. Stats. 1916, § 6336s, p. 7359.)

§ 114. Jurisdiction in Arbitration of Disputes Between Common Carriers and Employees.

Part § *5, Act July 15, 1913, c. 6.* Arbitrators under the above act "may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as is provided for in the act to regulate commerce approved February fourth, 1887, and amendments thereto." (Fed. Stats. Ann., 2d ed., title "Labor"; 8 U. S. Comp. Stats. 1916, § 8670.)

§ 8, *Act July 15, 1913, c. 6.* "That the award, being filed in the clerk's office of a district court of the United States as hereinbefore provided, shall go into practical operation, and judgment shall be entered thereon accordingly at the expiration of ten days from such filing, unless within ten days either party shall file exceptions thereto for matter of law apparent on the record, in which case said award shall go into practical operation, and judgment be entered accordingly, when such exceptions shall have been finally disposed of either by said district court or on appeal therefrom. At the expiration of ten days from the decision of the district court upon exceptions taken to said award as aforesaid judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of questions of law presented by said exceptions and to be decided. The determination of the circuit court of appeals upon said questions shall be final, and, being certified by the clerk thereof to the district court, judgment pursuant thereto shall thereupon be entered by said district court. If exceptions to an award are finally sustained, judgment shall be entered setting aside the award in whole or in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject-matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award. Nothing in this act contained shall be construed to require an employee to render personal service without his consent, and no injunction or other legal process shall be issued which shall compel the performance by any employee against his will of a contract for personal labor or service." (Fed. Stats. Ann., 2d ed., title "Labor"; 8 U. S. Comp. Stats. 1916, § 8673; Georgia etc. Ry. Co. v. Brotherhood, etc., 217 Fed. 755, 132 C. C. A. 559.)

CHAPTER 6.

FEDERAL QUESTIONS.

SEC.

120. What is a Federal Question?
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130. How Questions must Appear in a State Court to be Removed to Federal Court.
131. Plea of Res Adjudicata as Raising a Federal Question.
132. Raising the Issue as to Federal Question.

§ 120. What is a Federal Question? A federal question is one arising under the constitution or a law of the United States or treaties made, whenever the correct decision of the suit depends upon the construction of either, or when the title or right set up by the party may be defeated by one construction or sustained by the opposite construction.[1]

A federal question does not arise merely because it becomes necessary in the progress of the litigation to construe the federal constitution, laws or treaties.[2]

1 Cohens v. Virginia, 6 Wheat. (U. S.) 379, 5 **L. Ed.** 285; Osborn v. Bank of United States, 9 Wheat. (U. S.) 822, 6 **L. Ed.** 224; Oregon v. Three Sisters Irr. Co., 158 Fed. 346; Hall v. Chicago etc. R. R. Co., 149 Fed. 564.

2 Miller v. Illinois Central R. Co., 168 **Fed.** 982; Leggett v. Great Northern R. Co., 180 Fed. 314.

§ 121. Arises in Suits With Federal Officers Involving Official Acts.

Part § 24, Jud. Code. "The district court shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law or in equity, brought by the United States, *or by an officer thereof* authorized by law to sue. . . . " (Quoted above in full, § 94.)

Suits brought by federal officers find their authority in this section and preceding provisions of the law of like character. Suits against federal officers stand on a different footing and are discussed hereafter. A receiver of a national bank appointed by a comptroller of currency comes within this clause, and may sue without regard to the citizenship of the parties or the amount involved.[3] So, also, an agent of a national bank who has displaced a receiver comes under the rule,[4] and a postmaster-general suing under the official bond of a postmaster.[5]

Suits *against* United States officers do not come under the above-quoted provision,[6] but are held to arise under the laws of the United States as necessarily involving the construction thereof.

"An action against a United States marshal and his deputy, growing out of their acts in executing the process of a court of the United States, is, regardless of citizenship of the parties, within the jurisdiction of the United States circuit (now district) court for the proper district; and this is so even where there is no disputed question of federal law in the case."[7]

"A case in which an attack upon the official acts of a United States marshal is made covertly, by suppressing the facts which constitute an essential part of the *res gestae* in the first pleading, is none the less a case arising under the laws of the United States."[8]

3 Gibson v. Peters, 150 U. S. 342, 37 **L. Ed.** 1104, 14 Sup. Ct. 134; Schofield v. Palmer, 134 Fed. 753; Murray v. Chambers, 151 Fed. 142.

4 McConville v. Gilmour, 36 Fed. 277, 1 **L. R. A.** 498.

5 Postmaster-General v. Early, 12 Wheat. (U. S.) 136, 6 **L. Ed.** 577; Postmaster-General v. Furber, 4 Mason, 333, 19 Fed. Cas. No. 11,308.

6 Hallam v. Tillinghast, 75 Fed. 849.

7 Wood v. Drake, 70 Fed. 882, citing Bock v. Perkins, 139 U. S. 628, 35 **L. Ed.** 314, 11 Sup. Ct. 677; Grant v. Spokane Nat. Bank, 47 Fed. 673.

8 Ibid.

"The national government must be permitted to exercise its power within the states through its own agencies. The national courts are the proper tribunals for adjudicating of questions as to the validity of their own process, and the lawfulness of the acts of their own ministers in executing the same."[9]

The following are illustrations of suits by and against federal officers held to involve federal question by reason of the character of the party:

Action against executors and heirs of an internal revenue collector to recover taxes alleged to have been illegally collected by such collector;[10] a suit upon a bond of the clerk of the circuit court;[11] on bond of a marshal;[12] to recover damages for wrongful levy by marshal;[13] suit on government contractor's bond.[14]

Special provision is made for removal of cases against a United States officer acting under the civil rights laws.

> *Part § 31, Jud. Code*[15] (*Re-enacting § 641, Rev. Stats.*). "When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, . . . against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause stating the facts and verified by oath, be removed for trial into the next district court to be heard in the district where it is pending. . . . " (Quoted in full *infra*, § 207.)

9 Wood v. Drake, 70 Fed. 881–883, and cases cited.

10 Sinking Fund Commissioners v. Buckner, 48 Fed. 533; see, also, Orner v. Saunders, 3 Dill. 284, 18 Fed. Cas. No. 10,584.

11 Howard v. United States, 184 U. S. 681, 46 **L. Ed.** 754, 22 Sup. Ct. 543.

12 Feibelman v. Packard, 109 U. S. 421, 27 **L. Ed.** 984, 3 Sup. Ct. 289.

13 Hurst v. Cobb, 61 Fed. 1. But see McKee v. Rains, 10 Wall. (U. S.) 22, 19 **L. Ed.** 860, where a suit against a marshal for trespass in levying on goods for a third party, held not to involve a Federal question.

14 Mullin v. United States, 109 Fed. 817, 48 C. C. A. 677.

15 Constitutional, Ex parte Virginia, 100 U. S. 339, 25 **L. Ed.** 676; Strauder v. West Virginia, 100 U. S. 310, 25 **L. Ed.** 667; California v. Chue Fan, 42 Fed. 865.

Federal receivers. It was formerly held that a federal question arose in the case of receivers appointed by federal courts by virtue of a federal appointment. But it is now held that such appointment does not raise a federal question so as to allow removal to a federal court on that ground.[16]

§ 66, Jud. Code, permits a federal receiver to be sued without previous leave of the court in respect to any act or transaction of his in carrying on the business connected with the property. (Quoted in full *infra*, § 1083.)

§ 122. Arises in Suits With Federal Corporations Existing Under Federal Laws. A federal corporation is organized under and depends upon a federal law. It is held that a suit against a federal corporation therefore involves a federal question irrespective of the citizenship of the parties or any other law involved. If a complaint filed in the state court shows on its face that the defendant corporation is one organized under federal laws, except in cases of national banks,[17] the suit may be removed to the federal court as presenting a federal question.[18]

It has even been held that the suit is removable, though there is nothing in the plaintiff's pleading showing that defendant is a federal corporation.[19] But a different holding appears in Oregon Short Line etc. R. Co. v. Skottowe, 162 U. S. 490, 40 **L. Ed.** 1048, 16 Sup. Ct. 869.

> §§ *5 and 6, Act of Jan. 28, 1915, c. 22.* "§ 5. (Jurisdiction of United States Courts—Action by or against railroad.) No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the

[16] **Pope v. Louisville etc. R. Co., 173 U. S. 573, 43 L. Ed. 814, 19 Sup. Ct. 500; Dale v. Smith, 182 Fed. 360; People v. Bleecker St. etc. R. Co., 178 Fed. 156; Pepper v. Rogers, 128 Fed. 987; Rural Home Telephone Co. v. Powers, 176 Fed. 986.**

[17] **§ 123, *post.***

[18] **Pacific Railroad Removal Cases, 115 U. S. 1, 29 L. Ed. 319, 5 Sup. Ct. 1113.**

[19] **Texas etc. R. Co. v. Cody, 166 U. S. 606, 41 L. Ed. 1132, 17 Sup. Ct. 703; Supreme Lodge, etc. v. Wilson, 66 Fed. 785, 14 C. C. A. 264; Sullivan v. Barnard, 81 Fed. 886; Pitkin v. Cowen, 91 Fed. 599; Gold Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. Ed. 656.**

ground that said railroad company was incorporated under an Act of Congress." (38 Stats. 804; 6 Fed. Stats. Ann., 2d ed., title "Judiciary"; 2 U. S. Comp. Stats. 1916, § 1233a, p. 1889.)

§ 6. (Effect of Act—Pending cases—Amendment or repeal of existing acts.) That this Act shall not affect cases now pending in the Supreme Court of the United States or cases in which writs of error or appeals have been allowed at the date of its approval. And nothing in this Act shall be deemed to repeal, amend, or modify the provisions of an Act entitled 'An Act providing for writs of error in certain instances in criminal cases,' approved March second, nineteen hundred and seven." (38 Stats. 804; 6 Fed. Stats. Ann., 2d ed., title "Judiciary"; 3 U. S. Comp. Stats. 1916, § 1704a, p. 3567.)

§ 123. Exception—Suits With National Banks Other Than by or Against Officers of the United States.

Subd. 16, § *24.* "Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located." (Quoted above in full § 94.)

The latter part of this section places national banks on the same footing as individuals of other corporations with respect to the right to sue and be sued in the federal courts. There must be either diversity of citizenship, or a federal question otherwise involved, to permit suits by or against national banks under this provision.[20]

20 American National Bank v. Tappan, 174 Fed. 431; State Nat. Bank v. Eureka Springs Water Co., 174 Fed. 827; Continental Nat. Bank v. Buford, 191 U. S. 123, 48 L. Ed. 119, 24 Sup. Ct. 54.

§ 124. Arising Under the Constitution. Questions too numerous to discuss in this work arise under the federal constitution.

Art. 1, § 10, U. S. Const. "No state shall . . . pass any . . . law impairing the obligation of contracts. . . . " (11 U. S. Comp. Stats. 1916, p. 13,549.)

Art. 4, § 1, U. S. Const. "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every state. . . . " (11 U. S. Comp. Stats. 1916, p. 14,121.)

Art. 4, § 2, cl. 1, U. S. Const. "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." (11 U. S. Comp. Stats. 1916, p. 14,208.)

14th Amendment, pt. § 1, U. S. Const. " . . . no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (11 U. S. Comp. Stats. 1916, p. 14,441.)

15th Amendment, § 1, U. S. Const. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." (11 U. S. Comp. Stats. 1916, p. 14,977.)

§ 125. As a Ground of Original Jurisdiction.

Art. 3, § 1, cl. 1, U. S. Const. "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior court as Congress may from time to time ordain and establish. . . . " (11 U. S. Comp. Stats. 1916, p. 13,906.)

Art. 3, § 2, cl. 1, U. S. Const. "The judicial powers shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . . " (11 U. S. Comp. Stats. 1916, p. 14,015.)

Under the foregoing provisions of the United States constitution, Congress establishes the United States district courts as the

courts of original jurisdiction with certain limitations as to grounds of jurisdiction and as to the amount in controversy. One of those grounds of jurisdiction is the existence of a federal question.

Part § 24, Jud. Code. "The district courts have original jurisdiction as follows:

First. " . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, . . . *Provided, however,* That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. . . . " (Quoted above in full, § 94.)

§ 126. As a Ground for Removal. Under the constitutional provision quoted in the preceding section, Congress has power to provide for the removal of suits from state courts to the federal courts when such courts have original or appellate jurisdiction in such suits.[21]

The jurisdiction on removal depends upon the original jurisdiction in the district court, and therefore separate consideration is unnecessary, except in so far as the general subject of removal is treated in chapter 9, entitled, "Removal of Causes—Jurisdiction and Procedure."

It should be noted, however, that under the last part of § 28, Jud. Code, actions based on federal "employers' liability law" are not removable, although the district courts have original jurisdiction concurrent with that of the state courts in that kind of action.

Part § 28, Jud. Code[22] *(Re-enacting 25 Stats. 434).* "Any suit of a civil nature, at law or in equity, arising under the

21 Mayor etc. of Nashville v. Cooper, 6 Wall. (U. S.) 247, 18 **L. Ed.** 851.

22 Foulk v. Gray, 120 Fed. 156; Smith v. Lyon, 133 U. S. 315, 33 **L. Ed.** 635, 10 Sup. Ct. 303; In re Pennsylvania Co., 137 U. S. 457, 34 **L. Ed.** 741, 11 Sup. Ct. 143; Hanrick v. Hanrick, 153 U. S. 192, 38 **L. Ed.** 685, 14 Sup. Ct. 835; In re Cilley, 58 Fed. 977; Gumbel v. Pitkin, 124 U. S. 131, 31 **L. Ed.** 374, 8 Sup. Ct. 379.

Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States were given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. . . . " (See § 204, *post.*)

Added part § 28, Jud. Code, by Amendment Act January 20, 1914, c. 11. "*And provided further,* That no suit brought in any State court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine, and June eighteenth, nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000."

§ 127. Citizenship not Material in Suits Involving a Federal Question Except When Affecting Venue. The existence of a federal question is sufficient to sustain jurisdiction of the federal court independent of citizenship, provided the requisite amount or value is involved and the venue properly laid.

Suits at law or in equity, Western Union Teleg. Co. v. Louisville & N. R. Co., 201 Fed. 932; In re Silvies River, 199 Fed. 495.

Constitution, laws, or treaties, Anaconda Copper Mining Co. v. Butte-Balaklava Copper Co., 200 Fed. 808.

As to nonresidents, see Wind River Lumber Co. v. Frankfort Marine Accident & Plate Glass Ins. Co., 196 Fed. 340, 116 C. C. A. 160.

As to separable controversy, In re Silvies River, 199 Fed. 495.

Diverse citizenship, Anaconda Copper Mining Co. v. Butte-Balaklava Copper Co., 200 Fed. 808.

Remanding, Rice v. Boston & M. R. R., 203 Fed. 580.

Citizens of the same state may sue each other in the federal courts if a federal question is involved.[23]

Equity Rule 25 requires the citizenship and residence of each party to be set out in the bill. In suits based on a federal question the citizenship and residence of the parties is immaterial except in transitory actions where the residence of the defendant fixes the venue of the action under § 51, Jud. Code.

The requirements of the rule as to citizenship and residence in suits based on a federal question are chiefly for the sake of uniformity and to identify the parties. In such suits of a local nature, citizenship and residence of any of the parties are otherwise immaterial.

If the basis of the federal court's jurisdiction is diverse citizenship as well as a federal question, necessarily a proper showing of citizenship is essential.

§ 128. Amount Required to be in Controversy. (See chapter 8, *post.*) In that part of § 24, Jud. Code, quoted in § 125 above, it will be noted that, in cases based on a federal question, the matter in controversy, exclusive of interest and costs, must exceed the sum or value of $3,000, except in certain cases arising under federal laws enumerated in subdivisions second to twenty-five of that section, or if brought by the United States, or its officers.

To make diverse citizenship the ground of jurisdiction, the amount in controversy must always exceed $3,000, exclusive of interest and costs.

Where less than such amount is involved diverse citizenship is not material; there must be a federal question on which to base jurisdiction.

As the jurisdiction on removal depends on the original jurisdiction conferred on the district court, the amount required to be

[23] San Joaquin etc. River Canal Co. v. Stanislaus County, 90 Fed. 516, 520; Lund v. Chicago etc. R. Co., 78 Fed. 385; Jewett v. Whitcomb, 69 Fed. 417; United States Express Co. v. Allen, 39 Fed. 712; Ames v. Kansas, 111 U. S. 449, 28 L. Ed. 482, 4 Sup. Ct. 437; Owings v. Norwood, 5 Cranch (U. S.), 344, 3 L. Ed. 120; Patton v. Brady, 184 U. S. 611, 46 L. Ed. 715, 22 Sup. Ct. 493.

in controversy on removal is the same as that necessary to sustain the case if originally brought in the federal court.

§ 129. Question must Appear on the Face of the Bill in the Federal Court. To entitle a plaintiff to bring a suit originally in the United States district court, the federal question must appear on the face of his bill as a part of his cause of action.[24] It must be real, and not colorable merely.[25] It must be essential to his cause of action, and not merely in anticipation of a defense based on that ground.[26]

§ 130. How Question must Appear in a State Court to be Removed to Federal Court. To entitle a defendant to remove a case from the state court to the United States district court, the federal question must appear on the face of the initial pleading in the state court. The defendant cannot, in his petition for removal, set up the facts supplementing plaintiff's pleading so as to show a federal question.[27]

The defendant, however, is not precluded in such a case from obtaining the determination of a federal court as to a federal question involved in the suit, for if the plaintiff's pleading does not show such question, the defendant may, nevertheless, set up the federal question in his own pleading, and thus preserve the right of review by the supreme court of the United States on writ of error. This subject is treated more in detail in chapter 74, entitled "Writ of Error to State Court of Last Resort."

24 City R. Co. v. Citizens' Street R. Co., 166 U. S. 557, 41 **L. Ed.** 1114, 17 Sup. Ct. 653; St. Paul M. & M. R. Co. v. St. Paul & N. P. R. Co., 68 Fed. 2, 15 C. C. A. 167; New Orleans v. New Orleans Water Works, 142 U. S. 79, 35 **L. Ed.** 943, 12 Sup. Ct. 142; Hamblin v. Western Land Co., 147 U. S. 532, 37 **L. Ed.** 267, 13 Sup. Ct. 353; St. Louis etc. R. Co. v. State of Missouri, 156 U. S. 478, 39 **L. Ed.** 502, 15 Sup. Ct. 443.

25 Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 **L. Ed.** 511, 14 Sup. Ct. 654.

26 Florida Central R. Co. v. Bell, 176 U. S. 321, 44 **L. Ed.** 486, 20 Sup. Ct. 399.

27 Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 **L. Ed.** 511, 14 Sup. Ct. 654; Chappell v. Waterworth, 155 U. S. 102, 39 **L. Ed.** 85, 15 Sup. Ct. 34; Walker v. Collins, 50 Fed. 737, 1 C. C. A. 642, 59 Fed. 70, 8 C. C. A. 1, reversed in Walker v. Collins, 167 U. S. 58, 42 **L. Ed.** 76, 17 Sup. Ct. 738; Mayo v. Dockery, 108 Fed. 897.

§ 131. Plea of Res Adjudicata as Raising a Federal Question. "Where a state court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867 (now § 237, Jud. Code), may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the circuit court (now district court), and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by the state courts.

"The refusal by the courts of one state to give effect to the decisions of the courts of another state is an infringement of a different article of the constitution, to wit, the first section of article four; and the right to bring such a case before us by writ of error under the twenty-fifth section of the Judiciary Act, or the act of 1867 (now § 237, Jud. Code), is based on the refusal of the state court to give validity and effect to the right claimed under that article and section.

"In either case, therefore, whether the validity or due effect of a judgment of the state court, or that of a judgment of a United States court, is disallowed by a state court, the constitution and laws furnish redress by a final appeal to this court." [28]

[28] Dupasseur v. Rochereau, 68 U. S. 134, 135; Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S. 555, 556, 31 **L. Ed.** 202, 8 Sup. Ct. 217; National Foundry & Pipe Works v. Oconto Water Supply Co., 183 U. S. 233, 234, 46 **L. Ed.** 157, 22 Sup. Ct. 111; Pittsburg etc. R. Co. v. Long Island Loan & Trust Co., 172 U. S. 507, 43 **L. Ed.** 528, 19 Sup. Ct. 238; Phoenix Fire etc. Ins. Co. v. Tennessee, 161 U. S. 185, 40 **L. Ed.** 660, 16 Sup. Ct. 471; Mutual Life Ins. Co. v. McGrew, 188 U. S. 311, 63 **L. R. A.** 33, 47 **L. Ed.** 480, 23 Sup. Ct. 375; Embry v. Palmer, 107 U. S. 8, 9, 27 **L. Ed.** 346, 2 Sup. Ct. 25; Crescent City Livestock Co. v. Butchers' Union Slaughter-house, 120 U. S. 141, 30 **L. Ed.** 614, 7 Sup. Ct. 472.

§ 132. Raising the Issue as to Federal Question. The want of a federal question, being a matter of jurisdiction, may be raised under Equity Rule 29, either by a motion to dismiss or in the answer and separately heard, and in an action at law by the appropriate defensive pleading provided for raising jurisdictional questions in the state court,—generally by demurrer if the defect appears on the face of the complaint, or by plea or answer if it does not so appear. In case of removal the objection would be made in a motion to remand. In the event that a federal question is properly pleaded, but is fraudulently made for the purpose of giving jurisdiction when no actual federal question is involved that should be set up in the answer under Equity Rule 29 in some such form as follows:

Defendant further answering alleges that this suit does not really and substantially involve a controversy within the jurisdiction of this court in that this suit is wholly based on the alleged existence of a federal question; that the allegations in plaintiff's complaint that this suit is dependent [here state allegations mentioned in complaint as ground of federal jurisdiction], are not made truly and in good faith but are stated with a false and fraudulent purpose of imposing upon the jurisdiction of this court and are therefore fictitious and fraudulent.

Wherefore defendant prays that the suit be dismissed [or remanded] with costs.

CHAPTER 7.

DIVERSE CITIZENSHIP.

SEC.

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§ 140. In General.

Part § 24, Jud. Code. "The district courts shall have original jurisdiction as follows:—

"First. Of all suits of a civil nature, at common law or in equity, . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars and . . . (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens or subjects. . . ."

Part § 51, Jud. Code. " . . . but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district

of the residence of either the plaintiff or the defendant." (*supra*, § 61.)

It will be seen from the above quotations that in suits based on diversity of citizenship that (1) the matter in controversy must exceed, exclusive of interest and costs, the sum or value of three thousand dollars; (2) that the controversy must be between citizens of different states or between citizens of a state and foreign states, citizens, or subjects; and (3) that, where the fact that the action is between citizens of different states is the sole ground of jurisdiction, the action should be brought in the district of the residence of either the plaintiff or the defendant.

The existence of a federal question in these cases is immaterial except as bearing on the question of venue, which in actions not local should be in the district of the residence of defendant where both grounds of jurisdiction exist.

Where there is a federal question of such character that the amount in controversy is not material and the suit involves less than three thousand dollars, then the fact that there is a diversity of citizenship is immaterial because the amount in controversy will not support diversity of citizenship as a ground of federal jurisdiction.

Where diversity of citizenship is a sole ground of jurisdiction, the existence of a proper diversity and a proper amount in controversy are jurisdictional, and cannot be waived. The matter of venue is not jurisdictional in the same sense, but may defeat the action if timely objection be made by the opposing party.

§ 141. What is Citizenship? Citizenship is residence within a particular state with a *bona fide* intention that such residence shall be permanent. The residence and intention together constitute what is known as domicile.[1] Accordingly the mere averment of residence, which may be transient or with the expectation of not

[1] Butler v. Farnsworth, 4 Wash. 101, 4 Fed. Cas. No. 2240; Morris v. Gilmer, 129 U. S. 315, 32 L. Ed. 690, 9 Sup. Ct. 289; Mitchell v. United States, 21 Wall. (U. S.) 350, 22 L. Ed. 584; Marks v. Marks, 75 Fed. 324; Doyle v. Clark, 1 Flipp. 536, 7 Fed. Cas. No. 4053.

remaining, is not the equivalent of the averment of citizenship for the purpose of supporting jurisdiction in the federal court.[2]

This ruling has been held to be unaffected by the definition of citizenship as contained in the fourteenth amendment of the constitution of the United States, wherein it is declared that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.[3]

§ 142. Territorial and District of Columbia Citizens are not Included. The citizenship must be of that kind that identifies itself with a particular state. To be a citizen of the United States, and not of some state, is not enough.[4] Territorial and District of Columbia citizens are not citizens of a state, so as to base federal jurisdiction on the ground of diverse citizenship.[5] Thus a citizen and resident of Indian territory against a citizen of a state[6] and an action between state citizens and citizens of Porto Rico do not present a diversity of citizenship.[7]

On the ground of diverse citizenship the citizen of a territory cannot sue a citizen of a state in the federal courts and *vice versa*,[8] nor can a citizen of the District of Columbia sue a citizen of a state in the federal courts.[9]

2 Horne v. George H. Hammond Co., 155 U. S. 393, 39 L. Ed. 197, 15 Sup. Ct. 167; Wolfe v. Hartford Life etc. Ins. Co., 148 U. S. 389, 37 L. Ed. 493, 13 Sup. Ct. 602; Menard v. Goggan, 121 U. S. 253, 30 L. Ed. 914, 7 Sup. Ct. 873; Everhart v. Huntsville Female College, 120 U. S. 223, 30 L. Ed. 623, 7 Sup. Ct. 555; Grace v. American Cent. Ins. Co., 109 U. S. 278, 27 L. Ed. 932, 3 Sup. Ct. 207; Brown v. Keene, 8 Pet. (U. S.) 112, 8 L. Ed. 885; Turner v. Bank of North America, 4 Dall. (U. S.) 8, 1 L. Ed. 718.

3 Marks v. Marks, 75 Fed. 324; Shaw v. Quincy Min. Co., 145 U. S. 444, 36 L. Ed. 768, 12 Sup. Ct. 935; Anderson v. Watt, 138 U. S. 694, 34 L. Ed. 1078, 11 Sup. Ct. 449.

4 Prentiss v. Brennan, 2 Blatchf. 162, 19 Fed. Cas. No. 11,385.

5 Johnson v. Bunker Hill etc. Co., 46 Fed. 417; Hooe v. Jamieson, 166 U. S. 395, 41 L. Ed. 1049, 17 Sup. Ct. 596; 4 Fed. Stats. Ann., 2d ed., p. 943.

6 Kansas City S. R. Co. v. McGinty, 76 Ark. 356, 88 S. W. 1001.

7 Healy v. McCormick, 157 Fed. 318.

8 Johnson v. Bunker Hill etc. Co., 46 Fed. 417.

9 Seddon v. Virginia etc. Co., 36 Fed. 8, 1 L. R. A. 108; Hepburn v. Ellzey, 2 Cranch (U. S.), 445, 2 L. Ed. 332; New Orleans v. Winter, 1 Wheat. (U. S.) 91, 4 L. Ed. 44.

§ 143. States and Territories are not Citizens. "A state is not a citizen of any state, and, under the judiciary acts of the United States, it is firmly settled that a suit between a state and a citizen or corporation of another state is not between citizens of different states; and that in such cases the circuit courts (now district courts) of the United States have no jurisdiction of it unless it arises under the constitution, laws, or treaties of the United States." [10]

The District of Columbia and the territories have been held not citizens so as to create diversity of citizenship.[11]

§ 144. Corporations. Corporations, though artificial persons, are treated for the purpose of determining diverse citizenship as citizens of the state under which they are created.[12]

A corporation does not become a citizen of another state than that of its incorporation by transacting business and having an office therein, or agreeing as a condition of being permitted to transact business in such other state that it may be sued therein.[13]

Where a corporation is incorporated in two states, it is a citizen of both states for jurisdictional purposes.[14]

Corporations of different states consolidated in each of the states is a citizen of each.[15]

10 State v. Indiana, etc. v. Alleghany Oil Co., 85 Fed. 870. See, also, Ames v. Kansas, 111 U. S. 449, 28 L. Ed. 482, 4 Sup. Ct. 437; Germania Ins. Co. v. Wisconsin, 119 U. S. 473, 30 L. Ed. 461, 7 Sup. Ct. 260; Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 39 L. Ed. 231, 15 Sup. Ct. 192; State v. Tolleston Club, 53 Fed. 18; Ayer etc. Tie Co. v. Kentucky, 202 U. S. 409, 6 Ann. Cas. 205, 50 L. Ed. 1082, 26 Sup. Ct. 679; O'Conor v. Texas, 202 U. S. 501, 50 L. Ed. 1120, 26 Sup. Ct. 726; Southern R. Co. v. State, 165 Ind. 613, 75 N. E. 272; Darnell v. State, 174 Ind. 143, 90 N. E. 769; Ex parte Nebraska, 209 U. S. 436, 52 L. Ed. 876, 28 Sup. Ct. 581.

11 Johnson v. Bunker Hill etc. Co., 46 Fed. 417; Maxwell v. Federal Gold & Copper Co., 155 Fed. 110, 83 C. C. A. 570.

12 Barrow Steamship Co. v. Kane, 170 U. S. 100, 42 L. Ed. 964, 18 Sup. Ct. 526.

13 Baltimore etc. R. Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643; Philadelphia etc. R. Co. v. Quigley, 21 How. (U. S.) 202, 16 L. Ed. 73.

14 Memphis etc. R. Co. v. Alabama, 107 U. S. 581, 27 L. Ed. 518, 2 Sup. Ct. 432.

15 Baldwin v. Chicago etc. R. Co., 86 Fed. 167.

A municipal corporation is a citizen of the state creating it the same as a private corporation.[16]

Because a corporation is a citizen of the state wherein it is incorporated, the allegation of citizenship may read:

> "—— Company, a corporation, organized and existing under the laws of the state of ——, with its principal place of business in the county of ——, said state."

It has been held that the following statements were sufficient on which to base diverse citizenship:

> "Foreign corporation formed under and created by the laws of the state of New York."[17]
>
> "A corporation organized and domiciled in the state of New York."[18]
>
> "A body corporate by an act of the general assembly of Maryland."[19]
>
> "A body corporate in the state of Maryland incorporated by a law of the general assembly of Maryland."[20]
>
> "The Covington Drawbridge Company of Covington is a corporation of the state of Indiana."[21]
>
> "Organized under and pursuant to the laws of the state of New Jersey."[22]

The following averments were held insufficient:

> "A body politic in the law of and doing business in the state of California."[23]

16 Ysleta v. Canada, 67 Fed. 6; Cowles v. Mercer County, 7 Wall. (U. S.) 121, 19 L. Ed. 87.

17 United States Express Co. v. Kountze, 8 Wall. (U. S.) 342, 19 L. Ed. 457.

18 Ward v. Blake Mfg. Co., 56 Fed. 437, 5 C. C. A. 538.

19 Marshall v. Baltimore etc. R. Co., 16 How. (U. S.) 314, 14 L. Ed. 953.

20 Covington Draw Bridge Co. v. Shepherd, 21 How. (U. S.) 112, 16 L. Ed. 38; Philadelphia etc. R. Co. v. Quigley, 21 How. (U. S.) 202, 16 L. Ed. 73.

21 Covington Draw Bridge Co. v. Shepherd, 21 How. (U. S.) 112, 16 L. Ed. 38.

22 Block v. Standard Distilling etc. Co., 95 Fed. 978.

23 Pennsylvania v. Quicksilver Co., 10 Wall. (U. S.) 553, 19 L. Ed. 998.

"A corporation duly established by law and having its principal place of business at Boston, in the state of Massachusetts." [24]

"Doing business in the state of Iowa." [25]

A corporation organized under the laws of a foreign country is an alien.[26]

In Robertson v. Scottish Union etc. Ins. Co., 68 Fed. 173, the court held that the allegation in a petition for removal of a cause to a federal court, that the defendant is "a company duly chartered and incorporated under the laws of Great Britain," is a sufficient statement of the citizenship of such defendant to give the federal court jurisdiction. In Dundee Mortgage etc. Investment Co. v. School District, 21 Fed. 151, held that an allegation that plaintiff is a foreign corporation duly incorporated under the laws of Great Britain, in legal effect is the same as saying that it is a subject of Great Britain, and is sufficient.

§ 145. Joint Stock Companies. Joint stock companies partake both of the nature of partnerships and of corporations, and accordingly there has been a conflict of opinion as to whether the rule governing partnerships, or the rule governing corporations, should apply to these companies. It is now held that joint stock companies do not come under the rule governing corporations, but that the citizenship of the company depends upon the citizenship of the members.[27] An allegation that certain company was "a joint stock company organized under and by virtue of a law of the state of New York, and which said company is authorized by the laws of the state of New York to maintain and bring suits in the name of its president, for or on account of any right of action accruing to said company, and a citizen of the state of New York,"

[24] New York etc. R. Co. v. Hyde, 56 Fed. 188, 5 C. C. A. 461.
[25] Brock v. Northwestern Fuel Co., 130 U. S. 342, 32 L. Ed. 905, 9 Sup. Ct. 552.
[26] Baltimore etc. R. Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643; National Steamship Co. v. Tugman, 106 U. S. 118, 27 L. Ed. 87, 1 Sup. Ct. 58.
[27] Thomas v. Board of Trustees of Ohio State University, 195 U. S. 211. 49 L. Ed. 164, 25 Sup. Ct. 24; Saunders v. Adams Express Co., 136 Fed. 494.

was fatally defective in that it did not state that the company was a corporation.[28]

§ 146. Partnerships. A partnership is not a legal entity so as to have a citizenship of itself, but federal jurisdiction of suits by or against partnerships and voluntary associations depend upon the citizenship of the members composing them.[29]

§ 147. National Banks.

> *Part subd. 16, § 24, Jud. Code.* " . . . and all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the state in which they are respectively located."

The above-quoted provision makes jurisdiction as to national banks, except when the United States or a federal officer is a party, the same as any other corporation.[30]

§ 148. Married Women. The general rule is that the domicile of the husband is the domicile of the wife. But the rule does not apply when the wife is abandoned.[31] When an alien female marries a citizen, she becomes a citizen.[32]

> *§ 3, Act March 2, 1907, c. 2534.* "That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United

28 Chapman v. Barney, 129 U. S. 679, 32 **L. Ed.** 800, 9 Sup. Ct. 426.

29 Adams v. May, 27 Fed. 908; Conn v. Chicago etc. R. Co., 48 Fed. 177; Sawyer v. Switzerland Marine Ins. Co., 14 Blatchf. 452, Fed. Cas. No. 12,408.

30 First Nat. Bank v. Forrest, 40 Fed. 705; George v. Wallace, 135 Fed. 286, 68 C. C. A. 40; American Nat. Bank v. Tappan, 174 Fed. 431; Continental Nat. Bank v. Buford, 191 U. S. 123, 48 **L. Ed.** 119, 24 Sup. Ct. 54.

31 Thompson v. Stalmann, 139 Fed. 93; Watertown v. Greaves, 112 Fed. 183, 56 **L. R. A.** 865, 50 C. C. A. 172.

32 § 1994, Rev. Stats.; 2 Fed. Stats. Ann., 2d ed., p. 117; 4 U. S. Comp. Stats. 1916, § 1994, p. 3948.

States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein." (34 Stats. 1228; 2 Fed. Stats. Ann., 2d ed., p. 123; 4 U. S. Comp. Stats. 1916, § 3960, p. 4833.)

§ 4, *Act March 2, 1907, c. 2534.* "That any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation." (34 Stats. 1229; 2 Fed. Stats. Ann., 2d ed., p. 124; 4 U. S. Comp. Stats. 1916, § 3961, p. 4834.)

§ 149. **Personal Representatives.** "The test of jurisdictional authority is to be found in the citizenship of the parties who are actually before the court; and, if either of such parties sue or is sued in a representative capacity, his own citizenship, and not the citizenship of him whom he represents, is the determining factor." In a suit against the administrator, there must be diversity of citizenship between him and the complainant; and the fact that his decedent possessed the requisite citizenship at the time of the transactions giving rise to the suit, and at the time of his death, is immaterial.[33] It is not material in what state letters testamentary or of administration are granted.[34]

§ 150. **Trustees.** "If a trustee, by his citizenship, is qualified to sue in a federal court, the citizenship of the beneficiary under the trust is wholly unimportant. If the trustee is disqualified by reason of citizenship in the same state as that of the necessary defendants, the suit cannot be entertained, even though the bene-

[33] Bangs v. Loveridge, 60 Fed. 963; Dodge v. Perkins, Fed. Cas. No. 3954, 4 Mason, 435; Susquehanna etc. R. Co. v. Blatchford, 11 Wall. (U. S.) 172, 20 L. Ed. 179.

[34] Brisenden v. Chamberlain, 53 Fed. 310; Hess v. Reynolds, 113 U. S. 76, 28 L. Ed. 927, 5 Sup. Ct. 377.

ficiary might be qualified. The jurisdiction is to be determined, in all such instances, by the citizenship of the trustee. Neither is the rule changed by the refusal of the trustee to act. His refusal may authorize the beneficiary to exhibit a bill against the debtor to obtain a decree of a foreclosure. But, if the legal title to the property conveyed in trust be in the trustee, then the court cannot grant any relief until the trustee was made a party defendant.'' [35]

But where the trustee is a naked trustee, and his sole duty is to hold the property until defeasance, with no power over it, and no right or duty to foreclose, the rule does not apply.[36] A nonresident *cestui que trust* may sue in the federal court, when the trustee refuses to sue, by making the trustee a party defendant, where he is a resident of the same state as the other defendants.[37]

§ 151. Guardians. Where an infant sues or defends by a guardian or next friend, it has been held that the federal jurisdiction depends on the citizenship of the infant.[38] The domicile of the infant is that of its parents; if the father is living, that of the father; if dead, that of the mother. Where the parents are divorced, the domicile will be governed by the domicile of the parent to whom the infant has been awarded.[39]

It has been held that when the law of the state of the forum gives the general guardian a right to sue in his own name as such guardian, he is to be treated as the party plaintiff so far as federal jurisdiction is concerned.[40]

35 Shipp v. Williams, 62 Fed. 4, 10 C. C. A. 247; Gardner v. Brown, 21 Wall. (U. S.) 36, 22 **L. Ed.** 527; McRea v. Branch Bank of Alabama, 19 How. (U. S.) 376, 15 **L. Ed.** 688; Knapp v. Troy etc. R. Co., 20 Wall. (U. S.) 117, 22 **L. Ed.** 328; Watson v. Asbury Park etc. R. Co., 73 Fed. 1.

36 D. A. Tompkins Co. v. Catawba Mills, 82 Fed. 780.

37 Einstein v. Georgia So. & F. R. Co., 120 Fed. 1009; Omaha Hotel Co. v. Wade, 97 U. S. 13, 24 **L. Ed.** 917; Reinach v. Atlanta G. W. R. Co., 58 Fed. 33, 38.

38 Woolridge v. McKenna, 8 Fed. 650; In re McClean, 26 Fed. 49; Wilcoxsen v. Chicago etc. R. Co., 116 Fed. 444; Voss v. Neineber, 68 Fed. 947; Wiggins v. Bethune, 29 Fed. 51.

39 Marks v. Marks, 75 Fed. 325; Toledo Traction Company v. Cameron, 137 Fed. 49, 69 C. C. A. 28.

40 Mexican C. R. Co. v. Eckman, 187 U. S. 429, 47 **L. Ed.** 245, 23 Sup. Ct. 211.

§ 152. Aliens. Aliens are citizens or subjects of foreign states, and the district courts are given jurisdiction, when the controversy is between a citizen or citizens of a state and a citizen or citizens and subjects of foreign state.[41] An alien may sue a citizen or a citizen may sue an alien.[42]

In this class of cases as in suits between citizens of different states, the citizenship of parties on one side of the controversy must be attached to a particular state or states with an alien on the other side.[43] The bare allegation that the opposing party is an alien is not sufficient. It must be alleged that he is a subject or citizen of some one foreign state.[44] Federal courts have no jurisdiction of suits between aliens where no federal question is involved either alone or by joining citizens.[45]

A description of plaintiff as "a citizen of London, England," is not a sufficient averment that plaintiff is a citizen of Great Britain.[46]

The declaration may be amended to show that the plaintiff was an alien when the suit was commenced, instead of a citizen as alleged.[47]

§ 153. Indians. Indians are neither citizens nor aliens. An Indian residing within the United States is not "a foreign citizen or subject."[48] A member of an Indian tribe maintaining tribal relations is not a citizen of the United States, nor of the state of his residence, unless he has been naturalized in some manner.[49]

41 Prentiss v. Brennan, 2 Blatchf. 162, 19 Fed. Cas. No. 11,385.

42 Mossman v. Higginson, 4 Dall. (U. S.) 12, 1 L. Ed. 720; Piquignot v. Pennsylvania R. Co., 16 How. (U. S.) 104, 14 L. Ed. 863; Sherwood v. Newport News etc. Co., 55 Fed. 1, 5.

43 Picquet v. Swan, 5 Mason, 35, 19 Fed. Cas. No. 11,134.

44 Wilson v. City Bank, 3 Sumn. 422, 30 Fed. Cas. No. 17,797.

45 Johnson v. Accident Ins. Co. of North America, 35 Fed. 376; Hodgson v. Bowerbank, 5 Cranch (U. S.), 304, 3 L. Ed. 108; Rateau v. Bernard, 3 Blatchf. 244, 20 Fed. Cas. No. 11,579; Pooley v. Luco, 72 Fed. 561.

46 Stuart v. Easton, 156 U. S. 46, 39 L. Ed. 341, 15 Sup. Ct. 268.

47 Betzoldt v. American Ins. Co., 47 Fed. 705.

48 Karrahoo v. Adams, 1 Dill. 344, 14 Fed. Cas. No. 7614.

49 Paul v. Chilsoquie, 70 Fed. 401.

A child deriving citizenship through its negro mother, though with an Indian father, is a citizen for the purpose of jurisdiction.[50]

§ 154. Term "Citizen" Collective. The word "citizen," as used in the statute, is used in a collective sense, and means all parties on one side of a suit, considered as a whole, differ from all the parties on the other side of the suit in citizenship. "While the designation of a party 'plaintiff' or 'defendant' was in the singular number, it was intended to embrace all persons who were on one side, however numerous, so that distinct interest must be represented by persons all of whom were entitled to sue or were liable to be sued, in the federal court.[51]

The reason for this is apparent when it is remembered that the original intent of making diverse citizenship a ground of federal jurisdiction was to furnish an impartial tribunal for the determination of controversies between such parties. If a citizen of a state is opposed to a citizen of the same state, presumably justice would be given in the state court to its own citizens, and the joinder of nonresidents on one side or the other would not affect the case.

The federal court's jurisdiction is limited, and if it cannot take jurisdiction of a case between citizens of the same state, the mere fact that there is diverse citizenship as to other parties would not confer jurisdiction. It must appear that every party on one side of the action is a citizen of a different state from every party on the other side.[52] If two causes of action are set out, diversity must appear in both.[53] The same rule applies in suits between citizens and aliens. All the necessary parties on one side must

[50] Alberty v. United States, 162 U. S. 499, 40 **L. Ed.** 1051, 16 Sup. Ct. 864.

[51] Saginaw Gaslight Co. v. City of Saginaw, 28 Fed. 529; Strawbridge v. Curtiss, 3 Cranch (U. S.), 267, 2 **L. Ed.** 435; Susquehanna etc. R. & Coal Co. v. Blatchford, 11 Wall. (U. S.) 172, 20 **L. Ed.** 179.

[52] Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 37 **L. Ed.** 699, 13 Sup. Ct. 859; Anderson v. Bassman, 140 Fed. 10, 11; Peninsular Iron Co. v. Stone, 121 U. S. 633, 30 **L. Ed.** 1020, 7 Sup. Ct. 1010.

[53] Howe & D. Co. v. Haugan, 140 Fed. 184, 185; King v. Inlander, 133 Fed. 416.

be citizens of a state and all on the other side must have citizenship otherwise.[54]

§ 155. Change of Domicile After Suit Commenced. A change of citizenship after the suit is commenced will have no effect on the jurisdiction of the court, where the parties were citizens of different states at the commencement of the suit.[55] Nor will an assignment of the cause of action after the suit is begun, whereby the parties become citizens of the same state, affect the jurisdiction of the court once obtained.[56]

§ 156. Change of Citizenship or Transfer of Subject Matter to Give Jurisdiction.[57] If a citizen removes from one state to another in order to prosecute suits in the courts of the United States, provided the removal be real, the motive of the act cannot be inquired into.[58] But the change must be *bonâ fide*, and not merely ostensible.[59] A person who, residing in and transacting business in St. Louis, for the purpose of acquiring a residence for jurisdictional purposes crosses the river to East St. Louis, and there rents a room in which he sleeps at night while he continues to transact his business and also to take his meals in St. Louis, does not acquire a residence for jurisdictional purposes.[60]

Another mode of securing federal jurisdiction is to transfer the subject of litigation or the cause of action, to a nonresident. The test in this case is the same as that applied in a change of residence, whether or not the transfer was made in good faith. The

54 Tracy v. Morel, 88 Fed. 801; Sawyer v. Switzerland Marine Ins. Co., Fed. Cas. No. 12,408, 14 Blatchf. 452; Ex parte Girard, 3 Wall. Jr. 263, 265, Fed. Cas. No. 5457.

55 Pacific Mut. Life Ins. Co. v. Tompkins, 101 Fed. 539, 41 C. C. A. 488; Conolly v. Taylor, 2 Pet. (U. S.) 556, 7 L. Ed. 518; Anderson v. Watts, 138 U. S. 694, 34 L. Ed. 1078, 11 Sup. Ct. 449; Morgan v. Morgan, 2 Wheat. (U. S.) 297, 4 L. Ed. 24. See, also, cases cited 4 Fed. Stats. Ann., 2d ed., p. 949 et seq.

56 Anderson v. Watts, 138 U. S. 694, 34 L. Ed. 1078, 11 Sup. Ct. 449, *supra;* Hardenbergh v. Ray, 151 U. S. 112, 38 L. Ed. 93, 14 Sup. Ct. 305.

57 See § 97 above as to jurisdiction by assignment.

58 Briggs v. French, 2 Sumn. 251, 4 Fed. Cas. No. 1871.

59 Mitchell v. United States, 21 Wall. (U. S.) 352, 22 L. Ed. 587.

60 Kingman v. Holthaus, 59 Fed. 305.

mere fact that the subject matter of the suit has been transferred for the purpose of giving jurisdiction to the court will not defeat jurisdiction, provided there has been a *bona fide* sale and transfer, by which the transferee becomes the real owner and thereby the party to the suit.[61] But where it appears that a conveyance to plaintiff has been made without consideration for the sole purpose of making a case of diverse citizenship, the case will be dismissed on motion.[62] When all interest in the subject matter is parted with upon good consideration, then the fact that the motive was to get federal jurisdiction will not be considered.[63] But if at any time it appears that the parties to the suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under the act, the circuit court will proceed no further, but shall dismiss the suit or remand it to the court from which it was removed.[64]

§ 157. Shifting Parties to Create Diversity. It should appear in the bill that there is a diversity of citizenship to give jurisdiction; prior to the act of March 3, 1875, this was sufficient, and their position on the bill was conclusive.[65] But since 1875 the rule is that jurisdiction does not lawfully attach until all necessary parties are made parties. It is not in the discretion of the pleader to arrange parties in the suit so as to confer jurisdiction. They must be arranged according to their interests in the suit, and the court, when passing on the question of jurisdiction, will

61 Manhattan L. Ins. Co. v. Broughton, 109 U. S. 125, 27 **L. Ed.** 878, 3 Sup. Ct. 99; Collinson v. Jackson, 14 Fed. 305, 309, 8 Sawy. 357; Hawley v. Kepp, 2 Flipp. 177, 11 Fed. Cas. No. 6249; Briggs v. French, 2 Sumn. 251, 4 Fed. Cas. No. 1871.

62 Williams v. Nottawa, 104 U. S. 209, 26 **L. Ed.** 719; Bernards Tp. v. Stebbins, 109 U. S. 341, 27 **L. Ed.** 956, 3 Sup. Ct. 252; Greenwalt v. Tucker, 10 Fed. 884, 3 McCrary, 450; Maxweld v. Levy, 2 Dall. (U. S.) 381, 1 **L. Ed.** 424; 4 Dall. (U. S.) 330, 11 **L. Ed.** 854, 16 Fed. Cas. No. 9321.

63 Norton v. European & N. A. R. Co., 32 Fed. 865; Lake County v. Dudley, 173 U. S. 243, 43 **L. Ed.** 684, 19 Sup. Ct. 398; Irvine Co. v. Bond, 74 Fed. 849; Alkire Grocery Co. v. Richesin, 91 Fed. 79, 84; Ashley v. Board of Supervisors of Presque Isle County, 83 Fed. 534, 27 C. C. A. 585; Board of Commissioners of Lake County v. Schradsky, 97 Fed. 2, 38 C. C. A. 17.

64 Fountain v. Town of Angelica, 12 Fed. 8, 20 Blatchf. 448; Hawes v. Contra Costa Water Co., 25 Alb. Law J. 146 (S. C., 11 Fed. 93, note); Barney v. Baltimore City, 6 Wall. (U. S.) 280, 18 **L. Ed.** 825.

65 Bland v. Fleeman, 69 Fed. 669, 672.

do this. It will look to the real facts of the case, as developed by the pleadings, and will disregard the artificial arrangement of the parties by the pleader, and ascertain from the pleadings where the real controversy lies, and arrange the parties accordingly. Parties cannot, by arranging themselves as plaintiffs or defendants in a cause, create a fictitious ground of federal jurisdiction. This is denominated a joinder of parties to confer jurisdiction.[66] Where there are several defendants to a suit some of whom have the required diverse citizenship to support the bill, and some who have not, jurisdiction may be retained over the defendants as to whom diversity of citizenship exists, and a dismissal of the complaint may, and in the proper case will, be permitted against defendants who are not found to be within the jurisdiction of the court, unless such defendants are indispensable to the entry of a decree against the remaining defendants, and when it may be done without prejudice.[67] When the parties are before the court the court will, for the purpose of ascertaining the jurisdiction, arrange them according to their actual interests, and place them on the side of the controversy to which they belong, and, if it then appears that the controversy is not between citizens of different states, the court is without jurisdiction.[68] If some of the parties plaintiff have "interests identical with some of the parties defendant, and the interest is not separable, you cannot separate them because they are citizens of different states to get jurisdiction by diversity."[69]

[66] Bland v. Fleeman, 69 Fed. 669, 672; Stephens v. Smartt, 172 Fed. 466, 471.

[67] Horn v. Lockhart, 17 Wall. (U. S.) 570, 21 **L. Ed.** 657; Oxley Stave Co. v. Coopers' International Union, 72 Fed. 695; Mason v. Dullagham, 82 Fed. 689, 27 C. C. A. 296; Grove v. Grove, 93 Fed. 865; Smith v. Consumers' Cotton-Oil Co., 86 Fed. 359, 30 C. C. A. 103; Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689.

[68] Marvin v Ellis, 9 Fed. 367; Covert v. Waldron, 33 Fed. 311; Rich v. Bray, 37 Fed. 273, 2 **L. R. A.** 225; Williams v. Nottawa, 104 U. S. 209, 26 **L. Ed.** 719; Detroit City v. Dean, 106 U. S. 537, 27 **L. Ed.** 300, 1 Sup. Ct. 560; Mansfield etc. R. Co. v. Swan, 111 U. S. 379, 28 **L. Ed.** 462, 4 Sup. Ct. 510; Cashman v. Amador etc. Canal Co., 118 U. S. 58, 30 **L. Ed.** 72, 6 Sup. Ct. 926; Cilley v. Patten, 62 Fed. 498; Walster v. United States, 42 Fed. 892; Patten v. Cilley, 50 Fed. 337, 1 C. C. A. 522; In re Cilley, 58 Fed. 977.

[69] Carroll v. Chesapeake & O. Coal Agency Co., 124 Fed. 305, 309, 61 C. C. A. 49; Mangels v. Donau Brewing Co., 53 Fed. 513; Dawson v. Columbia Ave.

venue not being jurisdictional, the defect might be waived by the defendant's failure to object at the outset of the action.

This is a very different matter from that discussed in the preceding section. The following illustration will show the difference in the two classes of cases:

Supposing a citizen of California sued a citizen of Nevada together with a citizen of California in the federal district court in Arizona. The fact that there was a California citizen on each side of the controversy would be fatal to setting up diverse citizenship as a ground of federal jurisdiction, unless the suit against the California defendant could be dismissed. Assuming that this could be done, leaving the contest between the California and a Nevada citizen, there would be the requisite diversity of citizenship as a ground of federal jurisdiction, and the Arizona federal court would not be deprived of jurisdiction unless the Nevada defendant moved to dismiss for defect in venue.

§ 159. Issue of Citizenship—How Raised. The required diversity of citizenship must appear on the face of initial pleading on the part of the complainant, and if it does not appear, the court will assume that it has no jurisdiction and dismiss the bill.[72] If the suit is in equity, the matter is governed by the Equity Rule 29, providing for a *motion to dismiss* if the fact that there is not a proper diversity of citizenship appears on the face of the bill, or in the answer if it does not appear on the face of the bill.

72 Boston Safe Deposit & Trust Co. v. City of Racine, 97 Fed. 817; Consolidated Water Co. v. Babcock, 76 Fed. 243; First National Bank v. Radford Trust Co., 80 Fed. 569, 26 C. C. A. 1; Timmons v. Elyton Land Co., 139 U. S. 378, 35 L. Ed. 195, 11 Sup. Ct. 585; Horne v. George H. Hammond Co., 155 U. S. 394, 39 L. Ed. 197, 15 Sup. Ct. 167.

If a *motion to dismiss* is filed it may be in the following form:

In the District Court of the U. S. for the —— District of ——, —— Division.

John Doe,
Plaintiff,
v.
Richard Roe,
Defendant.

MOTION TO DISMISS.

And now comes Richard Roe, the defendant in the above-entitled action, and moves the court to dismiss this action and that he take his costs in this suit incurred, for that it appears by the pleadings filed, [or by the evidence taken], in the cause that —— [naming party] is not a citizen of the state of ——, as alleged, and therefore no diversity of citizenship exists as alleged and upon which basis the court is alleged to have jurisdiction.

A. B.,
Solicitor, etc.

It is a practice to be recommended, that the question of diversity of citizenship should be raised in the answer, before the case goes to trial. If it is not raised, the court will not infer a want of jurisdiction unless it affirmatively appears in the legitimate evidence taken on the main issues in the case. The court will not admit evidence on issues not raised in the pleadings. But if the issue is raised in the answer, all evidence tending to prove the issue will be admitted. If the answer raises the issue of diversity of citizenship, it may be substantially as follows:

In the District Court of the U. S. for the —— District of ——, —— Division.

John Doe,
Plaintiff,
v.
Richard Roe,
Defendant.

ANSWER.

Comes now the defendant, Richard Roe, and answers plaintiff's bill of complaint, as follows, to wit:—

Denies that the plaintiff is now, or ever has been a citizen of the state of —— [naming state] or that he is now, or ever has been an inhabitant of said state of —— [naming state] or that he does now, or ever has resided therein. But defendant alleges that plaintiff is now, and at the commencement of this suit was, a citizen and resident of the state of —— [naming state] of which state, that is, the state of —— [naming state] the defendant Richard Roe is and was at the commencement of this action, a citizen

and resident. That there is, therefore, no diversity of citizenship, nor ground of jurisdiction in this court.

[Then take up other defenses to the bill.]

Wherefore defendant prays the said plaintiff, John Doe, take nothing by his bill, that the said bill be dismissed, and that the defendant have his costs herein incurred.

A. B.,
Solicitor.

If the action is at law the issue would be raised in the same manner as a question of jurisdiction in the state court in which that district court is situated. All defenses in an action at law are open to a defendant in the district court of the United States under any form of plea, answer, or demurrer, which would have been open to him under like pleading in the courts of the state within which the district court is held. This may be by general denial where the state law permits.[73] If the defense of no jurisdiction must be especially pleaded in the state court, it may be so pleaded in the federal court, and testimony in reference to the citizenship of the parties is only admissible in support of allegations properly made in the pleadings.[74] If the issue is raised by demurrer in the state court, the same rule applies in the district court.[75]

§ 160. When Want of Diversity Appears on the Trial. It may happen that the want of the required citizenship, when it does not appear in the pleadings, and is not raised in the answer, will appear on the trial of the case. If it should appear thus, it is the duty of the court *sua sponte* to dismiss the case without either

[73] Chemung Canal Bank v. Lowery, 93 U. S. 72, 23 L. Ed. 806; Oscanyan v. Winchester Repeating Arms Co., Fed. Cas. No. 10,600, 15 Blatchf. 79, 17 Am. Law Reg. (N. S.) 626, 13 Amer. Law Rev. 161; affirmed, Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539; Lafayette Bridge Co. v. Streator, 105 Fed. 729; Theroux v. Northern Pac. R. Co., 64 Fed. 84, 87, 12 C. C. A. 52; Johnston v. Klopsch, 88 Fed. 692; Celluloid Mfg. Co. v. American Zylonite Co., 34 Fed. 744; Frank v. Chetwood, 9 Rep. 6, 9 Fed. Cas. No. 5051.

[74] Preferred Acc. Ins. Co. v. Barker, 93 Fed. 158, 35 C. C. A. 250.

[75] Chemung Canal Bank v. Lowery, 93 U. S. 76, 23 L. Ed. 806. See, also, Kent v. Bay State Gas Co., 93 Fed. 887.

motion or suggestion. But the defendant may take the initiative by filing a motion.[76]

> § *37, Jud. Code.* "If, in any suit commenced in a district court, or removed from a state court to a district court of the United States, it shall appear to the satisfaction of said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just." (36 Stats. 1098; 5 Fed. Stats. Ann., 2d ed., p. 398; 1 U. S. Comp. Stats. 1916, § 1019, p. 1033.)

Thus, the court must dismiss the case at once if it appears at any time during the progress of the case that it is without jurisdiction.[77] When the issue is raised it may be tried by the judge or submitted to a jury.[78]

§ 161. Amendment to Show Diversity.

> § *274c, Jud. Code,*[79] *by Amendment March 3, 1915, c. 90.* "That where, in any suit brought in or removed from any state court to any district of the United States, the jurisdic-

[76] Williams v. Nottawa, 104 U. S. 212, 26 **L. Ed.** 720; Farmington Village Corp. v. Pillsbury, 114 U. S. 144, 29 **L. Ed.** 114, 5 Sup. Ct. 807; Little v. Giles, 118 U. S. 603, 604, 30 **L. Ed.** 269, 7 Sup. Ct. 32; Hartog v. Memory, 116 U. S. 588, 29 **L. Ed.** 725, 6 Sup. Ct. 521; Morris v. Gilmer, 129 U. S. 315, 32 **L. Ed.** 690, 9 Sup. Ct. 289.

[77] Turner v. Farmers' Loan & T. Co., 106 U. S. 555, 27 **L. Ed.** 274, 1 Sup. Ct. 519; King Iron Bridge Co. v. Otoe County, 120 U. S. 226, 30 **L. Ed.** 624, 7 Sup. Ct. 552.

[78] Wetmore v. Rymer, 169 U. S. 115, 42 **L. Ed.** 684, 18 Sup. Ct. 293; Canadian Pac. R. Co. v. Wenham, 146 Fed. 206, 207.

[79] Amendment, Swayne v. Barsch (9th Cir.), 226 Fed. 581, 141 C. C. A. 337. By consent, Kennedy v. Bank of Georgia, 8 How. (U. S.) 586, 12 **L. Ed.** 1209. Discretionary power, Ayers v. Watson, 137 U. S. 584, 34 **L. Ed.** 803, 11 Sup. Ct. 201. Does not include dismissal, Thomas v. Andersan (8th Cir.), 223 Fed. 41, 138 C. C. A. 405. On removal, 5 Fed. Stats. Ann., 2d ed., p. 418.

tion of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal." (38 Stats. 956; 5 Fed. Stats. Ann., 2d ed., p. 1061; 2 U. S. Comp. Stats. 1916, § 1251c, p. 2023.)

CHAPTER 8.

AMOUNT IN CONTROVERSY.

SEC.

170. In General.
171. When Amount in Controversy is Material.
172. Same—Removal of Land Grant Cases.
173. When the Amount in Controversy is not Material.
174. What is "Amount in Controversy."
175. Amount Stated in Declaration or Bill Controls Unless Pleaded Erroneously or in Bad Faith.
176. Amount in Controversy Includes What.
177. Effect of Valid Setoff or Payment.
178. Aggregating Amounts to Create Jurisdiction.
179. Amendment to Show.
180. State Statutes Do not Control as to Splitting Demands.
181. Raising Issue as to Amount or Good Faith.

§ 170. In General. The federal statutes have made the sum or value of the matter in controversy an essential element of a large number of cases of which the district courts have jurisdiction both originally and on removal.

The matter in controversy must exceed, exclusive of interest and costs, the sum or value of $3,000 in cases brought in the federal court originally or on removal, and whether the action be based on the ground of diverse citizenship or a federal question, but with certain exceptions in the latter class of cases. Cases in which the amount in controversy is material are specifically enumerated in § 171 following.

The amount in controversy is not material in suits brought by the United States.[1] The amount is not material in suits between citizens of the same state claiming under land grants from different states in cases originally brought in the federal court,[2] but is

[1] United States v. Sayward, 160 U. S. 493, 40 L. Ed. 508, 16 Sup. Ct. 371; United States v. Reid, 90 Fed. 522; United States v. Flournoy Live Stock etc. Co., 71 Fed. 576; United States v. Kentucky River Mills, 45 Fed. 273; United States v. Shaw, 39 Fed. 433, 3 L. R. A. 232.

[2] United States v. Sayward, 160 U. S. 493, 40 L. Ed. 508, 16 Sup. Ct. 371.

material on removal under § 30, Jud. Code (§ 172 below). The amount is not material in cases of which the federal courts have exclusive jurisdiction and in other cases especially excepted in paragraphs 2 to 25 of § 24, Jud. Code. The provisions of § 24, Jud. Code, setting out the cases in which the amount in controversy is not material, are indicated in § 173 hereafter. § 24, Jud. Code, is quoted in full § 94 above.

The present chapter gives some suggestions as to what is meant by the sum or value of the matter in controversy and as to the pleading and determination of the issue of "amount in controversy."

§ 171. When Amount in Controversy is Material.

§ *24, Jud. Code.* "The district court shall have original jurisdiction as follows: First. Of all suits of a civil nature, at common law or in equity, . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of state and foreign states, citizens or subjects. . . . *Provided, however,* That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. . . ." (Quoted in full above, § 94.)

§ *28, Jud. Code.* "Any suit of a civil nature, at law or in equity, arising under the Constitution, or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any state court, may be removed. . . . Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any state court, may be removed. . . ." (See Amendment Jan. 20, 1914, quoted § 204, *post.*)

§ 172. Same—Removal of Land Grant Cases.

§ *30, Jud. Code*[8] (*Re-enacting part* § *647, Rev. Stats.*). "If in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state and the matter in dispute exceeds the sum or value of three thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim, and shall rely upon, a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial. If he or they inform the court that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this chapter, remove the cause for trial to the district court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim." (36 Stats. 1096; 5 Fed. Stats. Ann., 2d ed., p. 375; 1 U. S. Comp. Stats. 1916, § 1012, p. 1014; Foster's Federal Practice, 5th ed., pp. 20, 1832, 1869.)

§ 173. When the Amount in Controversy is not Material. In many cases under § 24, Jud. Code, the amount in controversy is immaterial. The provision as to value of the matter in controversy is expressly stated in § 24, Jud. Code, not to apply to the cases already mentioned, §§ 91 and 92 above, as coming under the exclusive jurisdiction of the federal courts, and also not to apply to suits under the following laws mentioned in the various subdivisions

[8] This act substitutes $3,000 for $2,000 as the jurisdictional amount, and substitutes the words "district court" for the words "circuit court." Pawlet v. Clark, 9 Cranch (U. S.), 292, 3 L. Ed. 735. In general, Stevenson v. Fain, 195 U. S. 165, 49 L. Ed. 142, 25 Sup. Ct. 6.

of § 24, Jud. Code, as follows: admiralty causes, seizures and prizes (subd. 3); relating to slave trade (subd. 4); cases under internal revenue, customs and tonnage laws (subd. 5); suits under postal laws (subd. 6); suits under the trademark laws (subd. 7); suits for violation of interstate commerce laws (subd. 8); suits on debentures for drawback of duties (subd. 10); suits for injuries on account of acts done under laws of the United States (subd. 11); suits concerning civil rights (subd. 12); suits against persons having knowledge of conspiracy under civil rights laws (subd. 13); suits to redress the deprivation under color of law of civil rights (subd. 14); suits to recover certain offices (subd. 15); suits involving national banking association (subd. 16); suits by aliens for torts (subd. 17); suits under immigration and contract labor laws (subd. 22); suits concerning allotment of lands to Indians (subd. 24); partition suits where United States is a joint tenant (subd. 25). In criminal prosecutions under the foregoing classification or suits for penalties and forfeitures the jurisdiction would be exclusive of the state courts, under § 256, Jud. Code, subds. 1 and 2 (§ 92 above).

The amount or value in controversy is also immaterial in all suits in law or in equity, brought by the United States or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states under the first part of § 24, Jud. Code, quoted § 94 above. But if in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state claiming under land grants of different states, the matter in dispute must exceed $3,000, exclusive of interest and costs, to entitle a party to *remove* to the federal court (§ 30, Jud. Code).

§ 174. What is "Amount in Controversy." The statutes and decisions use the terms interchangeably, "amount in controversy," "matter in dispute," "amount in dispute."

By such terms are meant either the amount sued for in good faith or the value of the property or right involved, depending upon the nature of the case.

Generally speaking, when there is a definite amount that can be determined as being in dispute between the parties, this will fix

the jurisdiction. But where a particular matter of itself less than the jurisdictional amount or value involves a right or estate as the subject of the dispute, which right or estate depends upon the determination of the controversy, the value of the right or estate will fix the jurisdiction.

Thus, the specific amount or value involved governs in a suit to enjoin an illegal property tax, the amount of the tax;[4] or to remove as a cloud on title a claim for a specified amount[5] or enforce a lien,[6] or partition of a specified interest,[7] or to obtain specific performance of contract.[8]

But there are many cases where a specific amount or value does not measure the amount or value of the matter in controversy, but the value of the object to be obtained and right to be protected, controls. For instance, the maintenance of a schedule rate,[9] preventing the establishment of a new schedule,[10] the property right of board of trade in its market quotations;[11] prevention of ticket scalping;[12] enforcement of a joint interest in a fund as on the dissolution of a partnership or corporation,[13] suit to quiet title or to remove cloud from title, where the value of the land is generally the determining element.[14]

If the matter in controversy has no pecuniary measure, the federal courts can take no jurisdiction, as in *habeas corpus* pro-

4 Douglas Co. v. Stone, 191 U. S. 557, 48 L. Ed. 301, 24 Sup. Ct 843; Turner v. Jackson Lumber Co,, 159 Fed. 926, 87 C. C. A. 106; Purnell v. Page, 128 Fed. 496.

5 Cooper v. Preston, 105 Fed. 403.

6 Stillwell-Bierce & S. V. Co. v. Williamston Oil & Fertilizer Co., 80 Fed. 68.

7 Rich v. Bray, 37 Fed. 273, 276, 2 L. R. A. 225.

8 Johnston v. Trippe, 33 Fed. 530.

9 Texas & P. R. Co. v. Kuteman, 54 Fed. 547, 4 C. C. A. 503.

10 Northern P. R. Co. v. Pacific Coast etc. Assn., 165 Fed. 2, 91 C. C. A. 39; Chesapeake & D. Canal Co. v. Gring, 159 Fed. 662, 86 C. C. A. 530; Southern P. Co. v. Bartine, 170 Fed. 725

11 Board of Trade v. Cella Commission Co., 145 Fed. 28, 76 C. C. A. 28; John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 12 L. R. A. (N. S.) 135, 82 C. C. A. 158.

12 Nashville, C. & St. R. R. Co. v. McConnell, 82 Fed. 65; Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689.

13 Kent v. Honsinger, 167 Fed. 620; Taylor v. Decatur Mineral & Land Co., 112 Fed. 449.

14 Holland v. Challen, 110 U. S. 15, 28 L. Ed. 52, 3 Sup. Ct. 495; Smith v. Adams, 130 U. S. 167, 32 L. Ed. 895, 9 Sup. Ct. 566.

ceedings by a father to obtain possession of his infant child,[15] or an action for divorce, alimony being within the discretion of the court.[16]

§ 175. Amount Stated in Declaration or Bill Controls Unless Pleaded Erroneously or in Bad Faith. If the sum demanded is so manifestly fictitious as to make it legally certain that the amount alleged was only to get jurisdiction and is not the real amount in controversy, the court will dismiss.[17] The same is true where it appears from the nature of the case stated in the pleadings that there could not legally be a judgment for an amount necessary to the jurisdiction. Thus, where a demand for $1,000 was alleged to be the value of certain property, and in addition $10,000 damages were claimed, the court reached the conclusion that the claim for damages could not be sustained as a matter of law, and the suit was dismissed.[18]

§ 176. Amount in Controversy Includes What. The statute says, "exclusive of interest and costs." Hence, items of expense in connection with a cause of action cannot be included unless the contract sued on covers same.[19] Attorneys' fees may be added when a part of the contract.[20] But where a statute makes attorneys' fees a part of the costs, they may not be considered.[21] A suit on a bond and *matured* interest coupons which are no longer a mere incident of the principal indebtedness but have become a principal obligation, will give the jurisdictional amount.[22]

15 Ex parte Everts, 1 Bond, 197, 8 Fed. Cas. No. 4581, 7 Amer. Law Reg. 79.
16 Bowman v. Bowman, 30 Fed. 849.
17 Jones v. McCormick Harvesting Machine Co., 82 Fed. 295, 27 C. C. A. 133; Battle v. Atkinson, 115 Fed. 384.
18 Vance v. Vandercook Co., 170 U. S. 468, 42 L. Ed. 1111, 18 Sup. Ct. 645.
19 Less v. English, 85 Fed. 471, 29 C. C. A. 275.
20 Rogers v. Riley, 80 Fed. 762; Swofford v. Cornucopia Mines, 140 Fed. 958.
21 Peters v. Queen Ins. Co., 182 Fed. 113.
22 Edwards v. Bates County, 163 U. S. 269, 41 L. Ed. 155, 16 Sup. Ct. 967.

§ 177. Effect of Valid Setoff or Payment. A party, in alleging the amount of his claim, is presumed to know of any payments made on the claim or valid setoffs existing against it, and hence if such payment or setoff appears from the record undisputed the court will not have jurisdiction.[23] But if the payment or setoff is disputed, the mere pleading thereof will not defeat the claim, because, as the court says, "who can say in advance that the defense will be insisted on, or, if presented, would be sustained by the court?".[24]

§ 178. Aggregating Amounts to Create Jurisdiction. If the claims are joint claims, they may be aggregated to create the jurisdictional amount,[25] but not if they are separable.[26] So, also, an assignee of several claims against single defendant may sue in the federal court, provided the several assignors had the requisite diversity of citizenship necessary to confer jurisdiction. This is so even though the claim of each assignor was less than the jurisdictional amount.[27]

§ 179. Amendment to Show. Amendments are permitted to show jurisdictional allegations, and this is true of the allegations as to the amount in controversy when the facts warrant such an amendment.[28]

§ 180. State Statutes do not Control as to Splitting Demands. The general rule that the federal court will not follow the state laws and decisions in matters which affect their jurisdiction applies to a state statute requiring demands to be split up into separate

23 Bedford Quarries Co. v. Welch, 100 Fed. 513.
24 Schunk v. Moline M. & S. Co., 147 U. S. 500, 37 L. Ed. 255, 13 Sup. Ct. 416.
25 Holt v. Bergevin, 60 Fed. 2.
26 Jones v. Mutual Fidelity Co., 123 Fed. 506, 510.
27 Bowden v. Burnham, 59 Fed. 752, 8 C. C. A. 248; Bernheim v. Birnbaum, 30 Fed. 885; Davis v. Mills, 99 Fed. 39.
28 Bowden v. Burnham, 59 Fed. 754, 8 C. C. A. 249; Bureau of National Literature v. Sells (W. D. Wash.), 211 Fed. 379, 383.

suits, which would defeat the jurisdiction of the court by reducing the demand below the jurisdictional amount.[29]

§ 181. Raising Issue as to Amount or Good Faith. The issue as to the amount in controversy, when it appears from the face of the record as a matter of law that the proper amount is not involved, may be raised in equity suits under Equity Rule 29, by a motion to dismiss or in the answer, and at law by demurrer or other appropriate pleading authorized by state statutes. Where such defect does not appear from the face of the record, the objection should be made under Equity Rule 29 in the answer when it may be separately heard. In an action at law objection would be by a plea or other appropriate pleading under the state practice.

Raising the issue of "amount" as a matter of law, the following allegation is suggested:

"Defendant alleges that it appears on the face of the bill of complaint that this case does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court, in that the matter in controversy, as appears from the bill of complaint, does not exceed the sum or value of three thousand dollars exclusive of interest and costs."

If the issue is as to good faith, the following allegation may be used:

"That this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court in that the amount sued for as alleged in the complaint is not truly stated and is not alleged in good faith, and defendant alleges that the matter in controversy does not exceed the sum or value of three thousand dollars exclusive of interest and costs."

[29] O'Connell v. Reed, 56 Fed. 531, 5 C. C. A. 586; Texas etc. R. Co. v. Gentry, 163 U. S. 353, 41 L. Ed. 186, 16 Sup. Ct. 1104.

CHAPTER 9.

REMOVAL OF CAUSES—JURISDICTION AND PROCEDURE.

SEC.

190. In General.
191. Jurisdiction—First Four Classes of Removal Cases.
192. Class One; Removal by Defendant or Defendants on Ground of Federal Question.
193. Class Two; Removal by Nonresident Defendant or Defendants on Ground of Diverse Citizenship.
194. Class Three; Removal of a Separable Controversy Wholly Between Citizens of Different States.
195. Procedure on Removal—Class One, Two and Three—Petition for Removal to be Filed Before Appearance Day in State Court.
196. Bond on Removal in Classes One, Two and Three.
197. Duty of State Court in Such Cases.
198. Notice to Adverse Party in Such Cases.
199. Procedure After Removal in Classes One, Two, and Three.
200. Class Four; Removal on Ground of Prejudice.
201. Remanding Separable Controversy in Class Four.
202. Remanding upon Failure to Show Prejudice—Class Four.
203. Remanding in Classes One, Two, Three and Four.
204. Common Carrier Employers' Liability Cases not Removable, nor for Property Damages, Unless in Excess of $3,000 Involved.
205. Class Five; Suits Between Citizens of a State Under Land Grants from Different States.
206. Class Six; Removal of Suits of Aliens Against Officers.
207. Class Seven; Removal of Civil Rights Cases.
208. *Habeas Corpus* Proceedings Where Civil Rights Denied, and Other Cases.
209. Class Eight; Removal in Cases Against Revenue or Congressional Officers.
210. Procedure on Removal Under Class Eight—Cases Against Revenue or Congressional Officers.
211. Procedure After Removal in Class Eight.
212. *Certiorari* and *Habeas Corpus* Proceedings in Class Eight—Suits Against Revenue or Congressional Officers.
213. Proofs of Records When Copies Refused by State Court Clerks.
214. Enforcement of Return of Record from State to Federal Courts.
215. Remand or Dismissal of Case Fraudulently or Improperly Removed.
216. Provisional Remedies of State Court Preserved—Bonds Given in State Suit—Valid on Removal.
217. Proceedings After Removal—Generally.

§ 190. In General. There are eight classes of cases in which there may be a removal from the state to the federal court.

Cases arising under the employers' liability act are specifically denied removal in the closing paragraph, § 28, Jud. Code, quoted in § 204, *infra.*

Class one includes cases involving a federal question. These may be removed by the defendant or defendants therein without regard to his or their residence. (§ 192, *infra.*)

Class two includes cases based on diverse citizenship. These may be removed by a nonresident defendant or defendants. (§ 193, *infra.*)

Class three includes separable controversies between citizens of different states of either classes one or two. Thus any defendant with a separable controversy based on a federal question, or any nonresident defendant relying on diverse citizenship and with a separable controversy, may remove. (§ 194, *infra.*)

The procedure is the same for classes one, two and three. (§ 195, et seq. *infra.*)

Class four includes cases between a citizen of a state and a citizen of another state, where such nonresident defendant may remove on the ground of prejudice or local influence. (§ 200, *infra.*) The time for removal and procedure in this class of cases differs from that in the first three classes of cases.

All four classes of cases may be remanded to the state court if improperly removed, either under § 28 or § 37, Jud. Code. (§ 203, *infra.*)

Class five includes cases between citizens of the same state claiming under land grants from different states. These are removable by either party under § 30, Jud. Code, and must involve in excess of $3,000 exclusive of interest and costs, although such amount is not required to give the federal court original jurisdiction. (§ 205, *infra.*)

Class six includes cases removable by defendant nonresident civil officers in suits brought against them by aliens under § 34, Jud. Code. (§ 206, *infra.*)

Class seven includes cases arising under the civil rights laws. These are removable by a defendant denied such civil rights under § 31, Jud. Code. (§ 207, *infra.*)

Class eight includes cases against revenue or congressional officers. These cases may be removed by them at any time before trial. (§ 209, *infra.*)

There are general provisions respecting proofs of state court records where copies are refused by the clerks of such court (§ 213, *infra*); for enforcing the return of the record from the state court (§ 214, *infra*); for preserving on removal attachment and sequestration liens, injunctional orders, bonds and undertakings (§ 216, *infra*), and for proceedings after removal (§ 217, *infra*). Remanding cases fraudulently or improperly removed, lacking jurisdictional grounds, may be done under § 37, Jud. Code. (§ 215, *infra.*)

The changes made in the practice by the Judicial Code are very few. It is now required under § 29, Jud. Code, what before was the general practice, that the petition for removal be verified. (§ 195, *infra.*) The bond for removal is now conditioned to enter in the district court "within thirty days from the date of filing said petition, a certified copy of the record, etc." (§ 196, *infra*), where formerly the condition was to enter suit "on or before the first day of the next regular session." The old practice of giving notice is now obligatory under § 29, Jud. Code, requiring "written notice of said petition and bond" prior to filing same. (§ 198, *infra.*)

The forms given in this chapter are adapted from Desty's Federal Procedure.

§ 191. Jurisdiction—First Four Classes of Removal Cases.

§ *28, Jud. Code.* "(Removal of suits from state to United States district courts.) Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be

pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any state court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. And when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. And where a suit is now pending, or may hereafter be brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that, from prejudice or local influence, he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause: *Provided,* That if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any district court, or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said state court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and,

unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in said state court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed: *Provided,* That no case arising under an act entitled, "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any state court of competent jurisdiction, shall be removed to any court of the United States." (36 Stats. 1094.)

"*And provided further,* That no suit brought in any State court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine, and June eighteenth, nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000." (38 Stats. 278; 5 Fed. Stats. Ann., 2d ed., p. 16; 1 U. S. Comp. Stats. 1916, § 1010, p. 841.)

§ 192. Class One; Removal by Defendant or Defendants on Ground of Federal Question.

Cl. 1, § 28, Jud. Code (above quoted in full). "Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may

hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district."

§ 193. Class Two; Removal by Nonresident Defendant or Defendants on Ground of Diverse Citizenship.

Cl. 2, § 28, Jud. Code (quoted in full supra, § 191). " . . . Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any state court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. . . . "

§ 194. Class Three; Removal of a Separable Controversy Wholly Between Citizens of Different States. Any defendant or defendants with a separable controversy wholly between citizens of different states may remove same from the state to the federal court, in cases of which the district court might have taken jurisdiction originally on the ground of a federal question. Likewise any nonresident defendant or defendants may remove his or their separable controversies where the district courts might have taken jurisdiction originally on account of diverse citizenship. (Aliens may not remove a separable controversy.) Both classes of cases are included in the following statutory provision:

Cl. 3, § 28, Jud. Code (quoted in full supra, § 191). " . . . And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. . . . "

To constitute a separable controversy, the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more states, on

one side, and citizens of other states, on the other, which can be fully determined without the presence of the other parties to the suit as it has been begun.[1] It must appear from the record that, upon the allegation of plaintiff's petition, there arises in the cause a controversy capable of separation from the other issues or questions presented by the petition, which, when separated, would be between citizens of different states.[2] When the cause of action is single, the fact that different defendants have different defenses does not create separable controversies.[3]

In Bates v. Carpentier, 98 Fed. 452, the court said "that, in order to justify a removal of a cause on the ground of a separate controversy between citizens of different states, the whole subject matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate causes of action, without the presence of others, originally made parties to the suit."

In Goldsmith v. Gilliland, 24 Fed. 154, 10 Sawy. 606, it was decided that a suit to quiet title to real property presented a subject matter capable of such separable determination, and, "where a number of persons claim undivided interests in real property adversely to one in possession of the same, the latter may maintain a suit to quiet his title against any or all of such claims, and neither of said persons or adverse claimants is a necessary party to a suit for that purpose against the other."

Where an action is brought by one plaintiff against several defendants, not because they claim any joint interest or are subject to any joint liability in respect to the subject-matter of the action, but merely for convenience, it will generally be capable of resolution into separable controversies between the plaintiff and the individual defendants.[4] A bill in equity to quiet title

[1] Fraser v. Jennison, 106 U. S. 191, 27 L. Ed. 131, 1 Sup. Ct. 171; Ayres v. Wiswall, 112 U. S. 187, 28 L. Ed. 693, 5 Sup. Ct. 90.

[2] Stanbrough v. Cook, 38 Fed. 369, 3 L. R. A. 400; Barth v. Coler, 60 Fed. 466, 9 C. C. A. 81; Thurber v. Miller, 67 Fed. 371, 14 C. C. A. 432.

[3] Robbins v. Ellenbogen, 71 Fed. 4, 18 C. C. A. 83.

[4] Bates v. Carpentier, 98 Fed. 452.

to real property, brought under the above conditions, has been decided to include a separable controversy with each of the defendants, so that, if one of them is a nonresident, he may remove the suit.[5] The fact that separate answers are filed, which raise separate issues in defending against one cause of action, does not create separable controversies, within the meaning of that term as used in the statute. They simply present different questions to be settled in determining the rights of the parties in respect to the one cause of action for which the suit was brought.[6]

In Shainwald v. Lewis, 108 U. S. 158, 27 **L. Ed.** 691, 2 Sup. Ct. 385, the suit was brought for the dissolution and settlement of an alleged partnership. The court said there was no separable or removable controversy. "The main dispute," said the court, "is about the existence of the partnership. All the other questions in the case are dependent on that. If the partnership is established, the rights of the defendants are to be settled in one way; if not, in another. There is no controversy in the case which now can be separated from that about the partnership, and fully determined by itself."

In Fidelity Ins. etc. Deposit Co. v. Huntington, 117 U. S. 280, 29 **L. Ed.** 898, 6 Sup. Ct. 733, the suit was a creditors' bill to subject encumbered property to the payment of the creditors' judgment, by sale and distribution of the proceeds among lienholders according to their priority. One lienholder sought to remove the suit, as to him, to a United States court, upon the ground that as to him there was a wholly separable controversy. The court said: "There is but a single cause of action, and that is the equitable execution of a judgment against the property of the judgment debtor. This cause of action is not divisible. Each of the defend-

5 Field v. Lownsdale, Deady, 288, Fed. Cas. No. 4769; Goodenough v. Warren, 5 Sawy. 494, Fed. Cas. No. 5534; Stanbrough v. Cook, 38 Fed. 369, 3 **L. R. A.** 400.

6 Hyde v. Ruble, 104 U. S. 407, 26 **L. Ed.** 823; Winchester v. Loud, 108 U. S. 130, 27 **L. Ed.** 677, 2 Sup. Ct. 311; Shainwald v. Lewis, 108 U. S. 158, 27 **L. Ed.** 691, 2 Sup. Ct. 385; Fidelity Ins. etc. Deposit Co. v. Huntington, 117 U. S. 280, 29 **L. Ed.** 898, 6 Sup. Ct. 733; Graves v. Corbin, 132 U. S. 571, 33 **L. Ed.** 462, 10 Sup Ct. 196; Torrence v. Shedd, 144 U. S. 527, 36 **L. Ed.** 528, 12 Sup. Ct. 726.

ants may have a separate defense to the action, but we have held many times that separate defenses do not create separate controversies, within the meaning of the removal act."

In Graves v. Corbin, 132 U. S. 571, 33 **L. Ed.** 462, 10 Sup. Ct. 196, the suit was a bill in equity filed in a state court by a judgment creditor of a partnership to reach its entire property. Certain judgments confessed by the firm, on which levies had been made, were attached for fraud. One of the judgment creditors removed the cause to the circuit court upon the ground that as to him there was a separable controversy. After a final decree for the plaintiff, the supreme court, on an appeal therefrom, held that the case was not removable.

A suit to try title to land is not a separable controversy.[7] An action to foreclose a mortgage where there are several defendants is not a separable controversy.[8]

The rule as illustrated by these cases in concise form is that if a nonresident party has an interest in a controversy which is separate and distinct, and does not necessarily involve the interest of the other defendants in the issue, or the other party on the same side, he can remove the whole case into the federal court. On the other hand, if the interests of the other party are so identified and so mixed up that they must and should be decided together, and depend on the final decree, which must depend upon and involve the rights of both parties, then it cannot be removed when one of the parties is a citizen of the same state with the plaintiff or defendant.[9]

Another class of cases in which the question of separable controversy arises is where there is a *joint and several liability*. Where the plaintiff's cause of action is joint and several, he has the option

7 Lomax v. Foster Lumber Co., 174 Fed. 959, 99 C. C. A. 463.

8 Thompson v. Dixon, 28 Fed. 6.

9 Wilson v. St. Louis etc. Ry. Co., 22 Fed. 3; affirmed, St. Louis etc. Ry. Co. v. Wilson, 114 U. S. 60, 29 **L. Ed.** 66, 5 Sup. Ct. 738; Central R. Co. v. Mills, 113 U. S. 249, 28 **L. Ed.** 949, 5 Sup. Ct. 456; Louisville & N. R. Co. v. Ide, 114 U. S. 52, 29 **L. Ed.** 63, 5 Sup. Ct. 735; Putnam v. Ingraham, 114 U. S. 57, 29 **L. Ed.** 65, 5 Sup. Ct. 746; Pirie v. Tvedt, 115 U. S. 41, 29 **L. Ed.** 331, 5 Sup. Ct. 1034, 1161; Crump v. Thurber, 115 U. S. 56, 29 **L. Ed.** 328, 5 Sup. Ct. 1154; Price v. Foreman, 12 Fed. 801, 11 Biss. 328; Mitchell v. Tillotson, 12 Fed. 737, 11 Biss. 325; Winchell v. Carle, 24 Fed. 865.

whether to sue the defendants individually or to join them in one action. If he elects to pursue the latter course, his choice determines the character of the suit, and no one of the defendants can treat the suit as it concerns him as several, for the purpose of a removal to the federal court.[10]

In Pirie v. Tvedt, 115 U. S. 41, 29 **L. Ed.** 331, 5 Sup. Ct. 1034, 1161, the court said: "The cause of action is several as well as joint, and the plaintiffs might have sued each defendant separately, or all jointly. It was for the plaintiffs to elect which course to pursue. They did elect to proceed against all jointly, and to this defendants are not permitted to object. The fact that a judgment in the action may be rendered against a part of the defendants only does not divide a joint action in tort into separate parts, any more than it does a joint action in contract." A defendant has no right to say that an action shall be several which the plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject matter of the controversy; and that is for all purposes of the suit, whatever the plaintiff declares it to be in his pleadings.[11] And if a person has a cause of action on which he may properly sue either one or two parties, and he chooses to sue both, he may do so though his motive in joining them is to prevent a removal to a federal court. That is, the motive is not considered.[12]

In the case of Deere, Wells & Co. v. Chicago, M. & St. P. R. Co., 85 Fed. 876, it was held that an action for damages against a railroad company incorporated by another state, and one of its section foremen, who is a citizen of the same state with plaintiff, charging them

10 Brown v. Coxe Bros. & Co., 75 Fed. 689; Boyd v. Gill, 19 Fed. 145, 21 Blatchf. 543; Western Union Tel. Co. v. Brown, 32 Fed 337; Mutual Reserve Fund Life Assn. v. Farmer, 77 Fed. 929, 23 C. C. A. 574; Louisville & N. R. Co. v. Ide, 114 U. S. 52, 29 **L. Ed.** 63, 5 Sup. Ct. 735; Pirie v. Tvedt, 115 U. S. 41, 29 **L. Ed.** 331, 5 Sup. Ct. 1034, 1161; Little v. Giles, 118 U. S. 596 30 **L. Ed.** 269, 7 Sup. Ct. 32; Torrence v. Shedd, 144 U. S. 527, 36 **L. Ed.** 528, 12 Sup. Ct. 726.

11 Louisville & N. R. Co. v. Ide, *supra;* Sloane v. Anderson, 117 U. S. 275, 29 **L. Ed.** 899, 6 Sup. Ct. 730; Little v. Giles, *supra;* Thorn Wire Hedge Co. v. Fuller, 122 U. S. 535, 30 **L. Ed.** 1235, 7 Sup. Ct. 1265.

12 Deere, Wells & Co. v. Chicago, M. & St. P. R. Co., 85 Fed. 876.

jointly with setting out a fire on the railroad right of way to clear it of dry grass and weeds, and negligently permitting it to spread to plaintiff's premises, does not disclose a separable controversy which would enable the railroad company to remove the cause.

In one action against a railroad company for negligence in handling a train and against a Pullman company for negligence in constructing the berth out of which the plaintiff was thrown, the court said: "In the first count of the declaration there is a separate and distinct cause of action stated against each one of the defendants, and neither one of the defendants could be held liable on the facts specifically averred against the other." The controversy is separable.[13]

§ 195. Procedure on Removal—Class One, Two and Three—Petition for Removal to be Filed Before Appearance Day in State Court.

Cl. 1, § 29, Jud. Code (Part new, part re-enacting 25 Stats. 433). "Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a state court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending. . . ."[14] (36 Stats. 1095; 5 Fed. Stats. Ann., 2d ed., p. 235; 1 U. S. Comp. Stats. 1916, § 1011, p. 954.)

[13] Batey v. Nashville etc. Ry., 95 Fed. 368. See, also, Dougherty v. Yazoo etc. R. Co., 122 Fed. 205, 58 C. C. A. 651; Fergason v. Chicago etc. Ry. Co., 63 Fed. 177; Hartshorn v. Atchison etc. R. Co., 77 Fed. 9; Coker v. Monaghan Mills, 110 Fed. 803; Lewis v. Cincinnati etc. Ry. Co., 192 Fed. 654; Veariel v. United Engineering etc. Co., 197 Fed. 877; Gustafson v. Chicago etc. Ry. Co., 128 Fed. 85; Yeates v. Illinois Cent. R. Co., 137 Fed. 943; Henry v. Illinois Cent. R. Co., 132 Fed. 715.

[14] Consent of counsel does not give district court jurisdiction, In re Foley, 76 Fed. 390. But facts may be admitted which will give the court

The party removing is also required to file a bond and transcript and give notice as set out in the following sections:

FORM 1.

PETITION FOR REMOVAL WHERE CAUSE INVOLVES A FEDERAL QUESTION.

In the District Court of, etc.,—State of Idaho.

[Title of Cause.]

To the Honorable Judge of the Court Aforesaid:

Your petitioners, defendants in the above-entitled action, respectfully represent and show to your honorable court:

That this is a civil action brought in this court in pursuance of an adverse claim, filed in the United States land office at Coeur d'Alene city, state of Idaho, by the plaintiff herein, to the application of the petitioners for a United States patent to a certain parcel of mineral land, situated in Shoshone county, in said state. That said action is in pursuance of the provisions of § 2326 of the Revised Statutes of the United States, for the determination of controversies arising between claimants to the right of possession of mineral lands claimed for patent by the parties thereto.

Your petitioners allege that they are each citizens of the United States and residents and citizens of the county of Shoshone, state of Idaho, and that the Shoshone Mining Company is a corporation doing business and claiming to be organized and existing under the laws of the state of Idaho.

That the value of the premises described in the complaint, exclusive of interest and costs, exceeds the sum of three thousand ($3,000) dollars.

That this action is a special action created and authorized by the statutes of the United States, to facilitate the sale and disposition of the public mineral lands by the land department, and involves the right of possession conferred by said statutes on claimants of the same who desire to obtain patents for the lands claimed by them, and is therefore within the jurisdiction of the courts of the United States.

That this action involves the questions of what is a lawful location of a mineral claim; what discovery of mineral is required to support such location, and what rights follow such location, discovery, and attempted appropriation, and the proper construction of the acts of Congress relating thereto.

That your petitioners are claimants of the title to the premises in controversy and the plaintiff is an adverse claimant thereto under the statute.

jurisdiction, Pittsburg etc. R. Co. v. Ramsey, 22 Wall. (U. S.) 322, 22 L. Ed. 823; Hyde v. Victoria Land Co., 125 Fed. 970.

In general, Fayette Title & Trust Co. v. Maryland, P. & W. V. Tel. & Tel. Co., 180 Fed. 928.

Petition, time for filing, Lewis v. Cincinnati, N. O. & T. P. Ry. Co., 192 Fed. 654.

Grounds for remand, Western Union Tel. Co. v. Louisville & N. R. Co. et al., 201 Fed. 932.

Procedure, Goins v. Southern Pac. Co., 198 Fed. 432.

Application, notice, Cayce v. Southern R. Co., 195 Fed. 786.

Your petitioners herewith present a good and sufficient bond as provided by the statute in such cases, that they will enter in such district court for the Northern Division of the District of Idaho, within thirty days from the filing of this petition a certified copy of the record in this suit and for the payment of all costs which may be awarded by the said court, if the said district court shall hold that this suit was wrongfully or improperly removed thereto. (If special bail was originally requisite in said cause add here, "and shall then and there appear and enter special bail in said suit.")

Your petitioners therefore pray that this court proceed no further herein, except to make the order of removal as required by law and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said court as provided by law, and as in duty bound your petitioners will ever pray.

State of ——, } ss,
County of ——, }

VW and XY, being each duly sworn according to law, severally depose and say:

I am one of the petitioners in the above-written petition and have read said petition, and the same is true of my own knowledge, except such matters as are therein stated on information and belief, and as to such statements I believe it to be true.

Subscribed and sworn to, etc.

FORM 2.

VERIFICATION BY ATTORNEY.

State of ——, } ss.
County of ——, }

VP, being first duly sworn, on oath says that he is one of the attorneys of the defendant in the above-entitled cause and of the petitioner named in the foregoing petition; that he has read the same and believes the same to be true, and affiant further says that said petitioner is absent from and is a nonresident of the county of ——, state of ——, in which said suit is brought, and that affiant makes this affidavit for the reason that the defendant is absent from and is a nonresident of the said county of ——, in which said suit is brought.

VP.

Sworn, etc.

FORM 3.

PETITION FOR REMOVAL—INVOLVING FEDERAL QUESTION.

In the Superior Court, etc.—State of California.

[Title of Cause.]

Now at the time of filing his first appearance in said entitled cause comes the said defendant and presents to this honorable court his petition for re-

moval of this suit to the district court of the United States, in and for the northern district of California, held at the city of San Francisco, and as grounds therefor respectfully shows:

First. That as shown by plaintiff's complaint on file herein, this suit arises under the laws of the United States providing for the disposition and sale of the public gold-bearing mineral lands.

Second. That each of the plaintiffs is and for more than five years last past has been a citizen of the state of California.

Third. That the defendant is and for more than five years last past has been a citizen of Minnesota.

Fourth. That the lands in controversy in this suit are of the value of $3,000.

[Conclusion as in Form 1.]

[Verification as in Form 1 or 2.]

FORM 4.

PETITION FOR REMOVAL INVOLVING FEDERAL QUESTION.

In the Superior Court of, etc.—State of California.

[Title of Cause.]

Your petitioners respectfully show that they are the defendants in this action, which is of a civil nature, in equity, and that the matter or amount in dispute exceeds the sum of $3,000, exclusive of interest and costs.

That said action is in equity, of a civil nature, and arises under the constitution and laws of the United States.

That the defendants, at and about the time of the commencement of the above-entitled action, were in the possession and occupancy of the mining ground known as the St. Lawrence Mine, near Moore's Flat, in Nevada county, state of California, and were engaged in working said property by the hydraulic process under a license or permit duly and regularly made and issued to the defendant Ah Wing as the owner of the property by the commissioners appointed and acting under and in pursuance of an act of the Congress of the United States, approved March 3, 1893, entitled, "An Act to Create the California Debris Commission, and to Regulate Hydraulic Mining in the State of California."

That said mining was carried on by said defendants in conformity to the license or permit aforesaid, and the rules, regulations, and requirements of said commission, and the provisions of said act of Congress.

That said action is brought to restrain and enjoin the defendants and each and all of them from working said mine by the hydraulic process; that the question of the force and effect of the said act of Congress and of the power and authority of said debris commission under said act of Congress, and of the legal effect of the license or permit granted by said commission to the defendant Ah Wing, and other acts performed by said commission relating to the subject matter of this action, are involved in said action; that said defense rests mainly upon said act of Congress and upon the power and authority of

the said commission thereunder, as will more fully appear from the complaint on file, and from the answer of the defendants thereto, filed herewith, to which reference is hereby made.

[Conclusion as in Form 1.]

[Verification as in Form 1 or 2.]

FORM 5.

PETITION FOR REMOVAL—CITIZENS OF DIFFERENT STATES.

(Nonresident Plaintiff v. Nonresident Defendant.)

In the Superior Court of, etc.—State of Washington.

[Title of Cause.]

To the Honorable Judges of the Above-entitled Court:

Comes now your petitioner, —— the above-named defendant, by his attorneys, —— and respectfully represents to this honorable court:

1. That on the —— day of ——, ——, the above-named plaintiff filed a complaint in the superior court of King county, state of Washington, praying for a judgment against the defendant upon a promissory note for the sum of three thousand ($3,000) dollars, with interest at 10 per cent per annum from ——, with costs, and attorneys' fees of 5 per cent of the amount due.

2. That on said date, and immediately after filing said complaint, the said plaintiff caused to be sued out a writ of attachment, and caused said writ of attachment to be delivered to the sheriff, who thereupon levied upon property of your petitioner in King county, Washington.

3. Your petitioner further avers that the time has not elapsed wherein your petitioner is allowed under the practice and laws of the state of Washington and the rules of said court to appear, plead, demur, or answer said complaint.

4. Your petitioner further avers that at the time of the commencement of said suit, and ever since then, and at the present time the plaintiff in said action, the Harrisburg Trust Company, was and is a corporation organized and existing under and by virtue of the laws of the commonwealth of Pennsylvania, and was a citizen and resident of the state of Pennsylvania, having its principal place of business at the city of Harrisburg in said state, and the defendant, at the time of the commencement of said suit was, and ever since has been, and still is, a citizen of the state of Wisconsin and a resident thereof, residing at the city of Oconomowoc in said state of Wisconsin.

5. Your petitioner further avers that this is a controversy between citizens of different states and more than three thousand ($3,000) dollars, exclusive of interest and costs, is involved therein.

[Conclusion as in Form 1.]

[Verification as in Form 1 or 2.]

FORM 6.

PETITION FOR REMOVAL—CITIZENS OF DIFFERENT STATES.

(Resident Plaintiff v. Nonresident Defendant.)

In the Superior Court of, etc.—State of California.

[Title of Cause.]

To the Honorable Superior Court of Humboldt County, State of California.

The petition of —— and —— defendants in the above-entitled action, respectfully shows to this honorable court.

That your petitioners are defendants in the above-entitled action.

That said action has been commenced against them in said court by said plaintiff, and that said action is of a civil nature.

That said plaintiff, in his complaint herein, claims in substance that on the —— day of ——, ——, your petitioner entered into a contract in writing with plaintiff for the purchase and acquisition of certain timber lands situate in said county and state, and that in such purchase and acquisition said plaintiff rendered certain services for defendants upon an agreed price, amounting to the sum of $5,479.46, for which he demands judgment against said defendants.

That your petitioners dispute said claim and deny all liability under the contract set out in the complaint herein.

That the matter in dispute in this action exceeds the sum of three thousand dollars, exclusive of interest and costs.

That the controversy in this action and every issue of fact and law therein is wholly between citizens of different states, and which can be fully determined as between them—that is to say, the plaintiff, ——, is now, and was at the time of the filing of the complaint in this action, a citizen and resident of the state of California, and the defendants, —— and ——, were then and still are citizens and residents of the state of New York.

That the time for your petitioners, as defendants in this action, to answer or plead to the complaint in said action has not yet expired and will not so expire until the —— day of ——, ——, and your petitioners have not yet filed any pleading or in any way appeared therein.

[Conclusion as in Form 1.]

[Verification as in Form 1 or 2.]

FORM 7.

PETITION FOR REMOVAL.

(Resident Plaintiff v. Nonresident Defendant and Resident Defendant Who has Disclaimed All Interest in the Action.)

In the Superior Court of, etc.—State of California.

[Title of Cause.]

The petition of ——, one of the above-named defendants, shows to the court as follows:

That the above suit was begun against your petitioner, —— and ——, in the superior court of the city and county of San Francisco, state of California, by

the filing of a complaint and the service of a summons and copy of the complaint therein, on the —— day of ——, ——. That the defendant, ——, filed his answer in said cause on the —— day of ——, ——. That your petitioner has not yet filed his answer; but that, as to your petitioner, said cause is now pending on his motion to strike out portions of the complaint herein; that said cause has not been tried.

That at the time said suit was begun, and at the present time, the plaintiff was and is a citizen and resident of the state of California, and the defendant, ——, was and is a citizen and resident of the state of Nevada; and that the said defendant, ——, was and is a citizen and resident of the state of California.

That the matters in dispute in said suit, and for which said suit is brought, exceed the sum of three thousand dollars, exclusive of costs. That the defendant, ——, has no interest in said action or the matters in dispute therein, or in any of the property therein mentioned, and has filed his answer disclaiming any interest of any name or nature in the same, or in the property described therein, and the same is wholly and solely the property of the defendant, ——.

[Conclusion as in Form 1.]

[Verification as in Form 1 or 2.]

FORM 8.

PETITION FOR REMOVAL.

(Citizens v. Aliens.)

In the Superior Court of, etc.—State of California.

[Title of Cause.]

The petition of ——, one of the above-named defendants, shows to the court as follows:

That the above suit was begun against your petitioners, ——, and ——, in the superior court of the county of Marin, state of California, by the filing of a complaint, and the service of a summons and a copy of the complaint herein on the defendants.

That your petitioners have not yet filed their answer, but that, as to your petitioners, said cause is now pending, and that said cause has not been tried.

That at the time said suit was begun, and at the present time, the plaintiffs are citizens and residents of the state of California, and the defendants are aliens and subjects of the United Kingdom of Great Britain and Ireland; the said defendant, ——, being a resident of the county of Marin, and the said —— residents of the county of Alameda, state of California.

That the matters in dispute in said suit, and for which said suit is brought, exceed the sum of three thousand dollars, exclusive of interest and costs.

[Conclusion as in Form 1.]

[Verification as in Form 1 or 2.]

FORM 9.

PETITION FOR REMOVAL FROM STATE COURT TO DISTRICT COURT.

(Resident Plaintiff v. Alien Defendant.)

In the Superior Court of, etc.—State of Washington.

[Title of Cause.]

To the Honorable, the Superior Court of the State of Washington, in and for the County of Jefferson, and to the Honorable —— Judge Thereof:

The petition of ——, the defendant in the above-entitled action, respectfully shows:

I.

That said action is a suit of a civil nature at common law, of which the district court of the United States has original jurisdiction, and has been brought and is now pending in this honorable court, and has not yet been tried, nor has the time at or before which the defendant, this petitioner, is required, by laws of the state of Washington, or any rules or rule of this honorable court, to answer or plead to the complaint of plaintiff elapsed, and the matter in dispute in said suit exceeds, exclusive of interest and costs, the sum and value of three thousand dollars, and said suit is a controversy between the plaintiff, who, at the time of the commencement of said suit, was and now is a citizen of the state of Washington, and this defendant, who is not a citizen of the state of Washington, but was, at the time of the commencement of said suit, and now is, a foreign citizen and subject; that is to say, a citizen of the British Empire and a subject of her Britannic Majesty, Queen Victoria, and that there are no other parties to said suit.

II.

That by reason of the premises this petitioner, said defendant, desires and is entitled to have said suit removed from said superior court of the state of Washington into the district court of the United States for the proper district at this time.

III.

That the district court of the United States for the ninth circuit, and in and for the northern division of the district of Washington, holding terms at the city of Seattle, is the district court of the United States for the proper district, being the district court of the United States held in the district where said suit is pending.

[Conclusion as in Form 1.]

[Verification as in Form 1 or 2.]

FORM 10.

PETITION FOR REMOVAL—SEPARABLE CONTROVERSY.

In the Superior Court of, etc.—State of California.

[Title of Cause.]

To the Honorable, the Superior Court of the City and County of San Francisco, State of California:

The petition of ——, one of the above-named defendants, shows as follows:

Your petitioner shows to this honorable court that he is one of the defendants in this suit, which is of a civil nature, and that the matter or amount in dispute in this cause exceeds the sum or value of three thousand dollars, exclusive of interest and costs.

That the controversy herein is between citizens of a state and of a foreign state; that the plaintiff, ——, was at the time of the commencement of this suit, and still is, a citizen of the state of California, residing in the county of Sonoma, in said state, and that your petitioner, ——, was, at the time of the commencement of this suit, and for seventeen years last past has been, a resident of the city of Denver, in the state of Colorado, and that your petitioner desires to remove this suit before the trial thereof into the next district court of the United States to be held in the —— northern district of California.

Your petitioner further shows that the causes of action that the plaintiff herein has against the two defendants for damages for the death of —— are separable controversies.

That on the —— day of ——, ——, your petitioner was engaged as an independent contractor to do certain work in the construction of a building on the lot of land situate at the southwest corner of Market and Third streets; that in the prosecution of said work it became and was necessary to place a certain piece of timber in an upright position, so that one end of said timber was against the under part of said cornice, and the other end was on the roof of the building on the lot next adjoining on the west. That the defendant, ——, is the owner of said last-mentioned lot. That it is claimed by the plaintiff that the aforesaid piece of timber fell from its place and struck the said ——, who was on the street beneath, and so injured him that he subsequently died.

That the cause of action that the plaintiff, —— has, if she has any, against your petitioner, is for his negligence, through his agents and servants, in improperly placing the said piece of timber. That the cause of action that plaintiff, ——, has, if she has any, against the defendant, ——, is for maintaining a nuisance upon his said premises. That therefore the said two causes of action are separable.

[Conclusion as in Form 1.]

[Verification as in Form 1 or 2.]

FORM 11.

PETITION FOR REMOVAL—SEPARABLE CONTROVERSIES AFTER DISMISSAL OF SUIT AGAINST OTHER DEFENDANTS.

[Title of Court and Cause.]

To the Honorable, the —— Court of State of ——.

Your petitioner respectfully shows that it is one of the defendants in the above-entitled suit, and that the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of three thousand dollars.

That there is in said suit a controversy which is wholly between citizens of different states, and which can be fully determined as between them, to wit, between your petitioner, the —— Ry. Co., defendant in said suit, who avers that it was at the commencement of this suit, and still is, a corporation organized under the laws of the states of Virginia and West Virginia, and of no other state, and that it was then and still is a citizen and resident of the states of Virginia and West Virginia, and of no other state, and that it was not then, and is not now, a resident or citizen of the state of Kentucky—and the plaintiff, ——, who was, at the commencement of this suit, and still is, a resident and citizen of the state of Kentucky. Your petitioner further says that the said defendants, ——, and ——, are all and every of them, citizens and residents of the state of Kentucky, and that they are fraudulently and improperly joined as parties defendant for the sole purpose of defeating the right of petitioner to remove to the United States circuit court.

That because of said joinder of said —— and ——, being citizens of the same state as said plaintiff, said cause was remanded to the state court.

Your petitioner says that the said suit as to said —— and —— was, on the —— day of ——, —— dismissed, that the said cause is now, for the first time, pending as to the said —— alone.

[Conclusion as in Form 1.]

[Verification as in Form 1 or 2.]

§ 196. Bond on Removal in Classes One, Two and Three.

Part § 29, Jud. Code. "Whenever any parties entitled to remove any suit mentioned in the preceding section, except suits removable on the ground of prejudice or local influence, . . . (he) shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein." (See § 195, *supra.*)

FORM 12.

BOND ON REMOVAL.

[Title of State Court and Cause.]

Know all men by these presents, that we, XY and Z, as principals, and M and N, as sureties, residents, and —— of the county of ——, state of ——, are held and firmly bound unto AB, plaintiff in the above-entitled cause, his successors and assigns, in the sum of five hundred ($500) dollars, lawful money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves, and each of us, our heirs, executors, and administrators, jointly and severally, by these presents.

The conditions of this obligation are such that:

Whereas, the said XY and Z have applied by petition to the (superior) court of the state of ——, in and for the county of ——, for the removal of a certain cause therein pending wherein AB is plaintiff and the said XY and Z are defendants, to the district court of the United States for the district of ——, —— division, for further proceedings on grounds in the said petition set forth, and that all further proceedings in said action in said —— court be stayed.

Now, therefore, if your petitioners, the said XY and Z shall enter in said district court of the United States for the district of ——, aforesaid, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and shall pay or cause to be paid all costs that may be awarded therein by said district court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, [Note.—If special bail was originally requisite in said cause add here: "And shall then and there appear and enter special bail in said suit"], then this obligation shall be void; otherwise shall remain in full force and effect.

Signed, subscribed and sworn, etc.

Sureties' justification.

State of ——, } ss.
County of ——, }

M and N, the sureties named in the foregoing bond, being first duly sworn, each for himself, deposes and says as follows: I am the same person whose name is subscribed to the foregoing bond, and I state I am a householder and resident of the county and state aforesaid, and that I am worth the sum of five hundred ($500) dollars named therein as the penalty thereof, over and above all my just debts and liabilities, exclusive of property which is exempt from execution.

M.
N.

Subscribed and sworn, etc.

§ 197. Duty of State Court in Such Cases.

Part § 29, Jud. Code. " . . . It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit."

§ 198. Notice to Adverse Party in Such Cases.

Part § 29, Jud. Code. " . . . Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same."

FORM 13.

NOTICE OF PETITION AND BOND FOR ORDER OF REMOVAL.

[Title of State Court and Cause.]

To Messrs. P and Q, Attorneys for Plaintiff:

Please take notice that the defendants will on ——, the —— day of ——, ——, at 10 o'clock, A. M., or as soon thereafter as counsel can be heard, move the court for an order removing said cause to the district court of the United States for the —— district of —— in accordance with the petition and bond of defendants, copies of which are hereto attached.

Dated the —— day of ——, ——.

——, Attorney for Defendants.

FORM 14.

ORDER OF REMOVAL.

[Title of State Court and Cause.]

This cause coming on for hearing upon petition and bond of the defendant herein for an order transferring this cause to the United States district court for the —— district of ——, —— division, and it appearing to the court that the defendant has filed his petition for such removal in due form of law, and that the defendant has filed his bond duly conditioned, with good and sufficient sureties, as provided by law, and that defendant has given plaintiff due and legal notice thereof, and it appearing to the court that this is a proper cause for removal to said district court.

Now, therefore, said petition and bond are hereby accepted and it is hereby ordered and adjudged that this cause be and it hereby is removed to the United States district court for the —— district of ——, —— division, and the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court, this —— day of ——, ——.

——, Judge.

FORM 15.

CLERK'S CERTIFICATE WITH RECORD.

[Title of State Court and Cause.]

State of ——, } ss.
County of ——, }

I, ——, county clerk of said county of ——, and *ex-officio* clerk of the superior court in and for said county, hereby certify the above and foregoing to be a full, true, and correct copy of the record, and the whole thereof, in the above-entitled suit heretofore pending in said superior court, being the suit No. ——, wherein AB is plaintiff and XY are defendants, said record consisting of the complaint, filed by said plaintiff in said suit on the —— day of ——, ——; the summons and return thereon, filed in said suit on the —— day of ——, —— [here add any other proceedings that may have been filed] the petition for removal of said suit to the United States district court, filed by said defendant in said suit on the —— day of ——, the bond for removal, the notice of petition and bond, and the order of removal of said suit to said United States district court, entered of record in said suit on the —— day of ——, ——, all as appears on file and of record in my office.

In testimony, etc.

[Seal] ——, Clerk.

FORM 16.

NOTICE OF REMOVAL.

In the District Court of, etc., of the United States.

[Title of Cause.]

You and each of you will please take notice that on the —— day of ——, ——, the above-entitled cause was duly transferred from the —— court of the —— county of ——, state of ——, to the district court of the United States, in and for the —— district of ——, and that the record in said cause has this day been duly filed in the said United States district court.

Dated ——, ——.

P & Q,
Attorneys for Defendant.

To the above-named plaintiff and to Messrs. —— and ——, Attorneys for Plaintiff.

§ 199. Procedure After Removal in Classes One, Two and Three.

Part § 29, Jud. Code. " . . . The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall,

within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court." (See § 195 above.)

§ 200. Class Four; Removal on Ground of Prejudice.

Part § 28, Jud. Code. " . . . And where a suit is now pending, or may hereafter be brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause. . . . " (See § 191 above.)

The petition or affidavit in this class of cases is addressed to the federal district court, instead of the state court, as in classes one, two and three discussed above. No notice of the filing of the petition seems to be required, nor need a bond be given although both notice and bond are the usual practice. The district court enters an order of removal, which order should be filed in the state court (Form 14, above, may be used by entitling in the federal court), and a transcript of the record obtained from the state court (Form 19 gives the writ to obtain same) should be filed in the federal court.[15]

Removal in these cases, instead of being required before the defendant is obligated under state practice to plead, may be "at any time before trial thereof," to wit, "before or at the term at which the cause could first be tried and before trial thereof."[16]

[15] Pennsylvania Co. v. Bender, 148 U. S. 255, 37 L. Ed. 441, 13 Sup. Ct. 591.

[16] McDonnell v. Jordan, 178 U. S. 229, 44 L. Ed. 1048, 20 Sup. Ct. 886.

FORM 17.

PETITION FOR REMOVAL ON GROUND OF PREJUDICE OR LOCAL INFLUENCE.

In the District Court of the United States, etc.

[Title of Cause.]

PETITION FOR REMOVAL FROM THE SUPERIOR COURT OF THE STATE OF ——, IN AND FOR THE COUNTY OF ——.

To the Honorable, the Judge of the District Court of the United States for the —— District of ——:

Your petitioner, the above-named Z, respectfully shows to this honorable court that A, as plaintiff, brought suit of a civil nature in the superior court of the state of ——, in and for the county of ——, against your petitioner Z, and that the matter or amount in dispute in said cause exceeds the sum or value of three thousand dollars, exclusive of interest and costs.

That the said controversy is between citizens of different states; that the plaintiff A was, at the time of the commencement of this suit and still is a citizen of the state of ——, the state wherein such suit is pending, and is residing at —— in said state; and that your petitioner Z was, at the time of the commencement of this suit, and still is, a citizen of the state of ——, and of no other state, residing in the city of —— in said state, and that your petitioner desires to remove this suit which is now pending and undetermined in said state court, before the trial thereof, into the district court of the United States to be held in the ——, district of ——.

Your petitioner further shows unto this honorable court that from prejudice and local influence in favor of the plaintiff and adverse to this defendant he will not be able to obtain justice in said court or in any other state court to which said defendant may, under the laws of the state, have a right to remove said cause, on account of such prejudice or local influence.

Wherefore your petitioner prays that an order be entered for the removal of said case from the —— court of said state to this court, and that a writ of *certiorari* issue for the return to this court of a certified copy of the record in said state court.

——, Petitioner.

[Verification as in Form 1 or 2.]

FORM 18.

AFFIDAVIT FOR REMOVAL OF CAUSE FOR PREJUDICE, ETC.

[Title of Federal Court and Cause.]

United States of America, }
—— District of ——, } ss.

I, Z, being duly sworn, do say that I am the defendant [or one of the defendants] in the above-entitled cause which is now pending for trial in the superior court of the state of —— in and for the county of ——, and that from prejudice and local influence I shall not be able to obtain justice in said

state court or in any other state court to which I may, under the laws of said state, have the right, on account of such prejudice or local influences, to remove said cause.

Subscribed and sworn to, etc.

FORM 19.

WRIT OF CERTIORARI FOR REMOVAL ON GROUND OF PREJUDICE OR LOCAL INFLUENCE.

The President of the United States of America to the Superior Court of the State of ——, in and for the County of ——, Greeting:

It being represented to us that there is now pending before you a certain cause No. ——, wherein A is plaintiff and Z is defendant, which cause was commenced in the superior court of the state of ——, in and for the county of ——, by A against the said Z, for the purpose of [state object of suit], and that on the —— day of ——, a summons was issued out of said court and that no trial has yet been had; and, whereas, said defendant has caused to be filed, in our district court for the —— district of ——, his petition for the removal of the said cause from the said superior court to the district court of the United States for the —— district of ——, and a bond with good and sufficient surety, according to the statutes of the United States in such case made and provided; and has made it appear to us that, from prejudice or local influence he will not be able to obtain justice in such state court or any other state court to which the defendant may, under the laws of the state, have the right to remove the said cause, we are willing to remove the said cause, and that the records and proceedings therein should be certified by said superior court and removed into our district court of the United States in and for the —— district of ——, and do hereby command you to certify and send the records and proceedings aforesaid, with all things concerning the same, to the said district court of the United States, together with this writ, so that you may have the same at the United States courthouse in the city of ——, in the said district of ——, on the —— day of —— in the said district court to be then and there held, that the said district court may cause to be done thereupon what of right, according to the laws of the United States, should be done.

Witness, the Honorable ——, Judge of said district court, and the seal of the said district court hereto affixed, the —— day of ——, ——.

——, Clerk of said District Court.

§ 201. Remanding Separable Controversy in Class Four.

Part § 28, Jud. Code. " . . . *Provided,* That if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the

suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein. . . . "

§ 202. Remanding upon Failure to Show Prejudice—Class Four.

Part § 28, Jud. Code. " . . . At any time before the trial of any suit which is now pending in any district court, or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said state court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in said state court, it shall cause the same to be remanded thereto. . . . "

§ 203. Remanding in Classes One, Two, Three and Four.

Part § 28, Jud. Code. " . . . Whenever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed. . . . " (See § 37, Jud. Code, in § 215, *infra.*)

§ 204. Common Carrier Employers' Liability Cases not Removable, nor for Property Damages, Unless in Excess of $3,000 Involved.

Part § 28, Jud. Code. " . . . *Provided,* That no case arising under an act entitled, 'An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any

state court of competent jurisdiction, shall be removed to any court of the United States."

Act January 20, 1914, c. 48, amending § 28, Jud. Code, by inserting at the conclusion thereof, "*And provided further,* That no suit brought in any state court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine, and June eighteenth, nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000."

§ 205. Class Five; Suits Between Citizens of a State Under Land Grants from Different States.

§ *30, Jud. Code.* "If in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceeds the sum or value of three thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim, and shall rely upon, a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial. If he or they inform the court that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this chapter, remove the cause for trial to the district

court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim." (36 Stats. 1096; 5 Fed. Stats. Ann., 2d ed., p. 375; 1 U. S. Comp. Stats. 1916, § 1012.)

§ 206. Class Six; Removal of Suits of Aliens Against Officers.

§ *34, Jud. Code.* "Whenever a personal action has been or shall be brought in any state court by an alien against any citizen of a state who is, or at the time the alleged action accrued was, a civil officer of the United States, being a nonresident of that state wherein jurisdiction is obtained by the state court, by personal service of process, such action may be removed into the district court of the United States in and for the district in which the defendant shall have been served with the process, in the same manner as now provided for the removal of an action brought in a state court by the provisions of the preceding section." (36 Stats. 1098; 5 Fed. Stats. Ann., 2d ed., p. 386; 1 U. S. Comp. Stats. 1916, § 1016.)

§ 207. Class Seven; Removal of Civil Rights Cases.

§ *31, Jud. Code.* "When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. Upon the filing of such petition

all further proceedings in the state courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the state court. It shall be the duty of the clerk of the state court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the district court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the district court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the district court, as herein provided, a certificate, under the seal of the district court, stating such failure, shall be given, and upon the production thereof in said state court the cause shall proceed therein as if no petition for removal had been filed." (36 Stats. 1096; 5 Fed. Stats. Ann., 2d ed., p. 376; 1 U. S. Comp. Stats. 1916, § 1013; Foster's Federal Practice, 5th ed., pp. 20, 1762, 1879.)

§ 208. Habeas Corpus Proceedings Where Civil Rights Denied, and Other Cases.

§ *32, Jud. Code.* "When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said state court, it shall be the duty of the clerk of said district court to issue a writ of *habeas corpus cum causa,* and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said district

court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said state court a duplicate copy of said writ." (36 Stats. 1097; 5 Fed. Stats. Ann., 2d ed., p. 380; 1 U. S. Comp. Stats. 1916, § 1014.)

§ 209. Class Eight; Removal in Cases Against Revenue or Congressional Officers.

Part § 33, Jud. Code (Combining § 643, Rev. Stats. and first part § 8, Sundry Civil Appropriation Act, 28 Stats. 401). "When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; or when any suit is commenced against any person for (*sic*) on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the district court next to be holden in the district where the same is pending, upon the petition of such defendant to said district court. . . ." (36 Stats. 1097; 5 Fed. Stats. Ann., 2d ed., p. 380; 1 U. S. Comp. Stats. 1916, § 1015.)

§ 210. Procedure on Removal Under Class Eight—Cases Against Revenue or Congressional Officers.

Part § 33, Jud. Code. " . . . the said suit or prosecution (i. e., against revenue or congressional officers) may, at any time before the trial or final hearing thereof, be removed for trial into the district court next to be holden in the district where the same is pending, upon the petition of such defendant to said district court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution

and be verified by affidavit, and, together with a certificate signed by an attorney or counselor at law of some court of record of the state where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office." (See § 209 above.)

FORM 20.

PETITION FOR REMOVAL BY CERTIORARI IN ACTION AGAINST REVENUE OFFICERS.

In the District Court of, etc., of the United States.

[Title of Cause.]

To the Honorable Judges of the District Court of the United States, for the Northern District of California.

The petition of ——, and ——, the defendants above named, respectfully showeth:

That before the commencement of the suit above named, and at all the times hereinafter mentioned, the said —— and —— were and now are the duly appointed and qualified collector of internal revenue of the United States and deputy internal revenue agent of the United States, respectively, for the first revenue district of California, and the said —— was at such times and is the United States marshal for the northern district of California, all of your petitioners acting under and by the authority of the internal revenue laws of the United States.

That heretofore, and on the —— day of ——, ——, one —— was the occupant and lessee of the premises, No. 624 Market Street, and the owner and in control of certain personal property therein contained, to wit: certain machinery, tools, implements, apparatus, fixtures, boxes, barrels, tobacco, and cigars, shelving and counters, and other articles and things.

That said —— on or about said day, and continuously theretofore and thereafter, and while in the occupancy of said premises and in the ownership and control of said personal property as aforesaid, having bonded the same as a cigar and tobacco manufactory, then and there committed certain violations against the said internal revenue laws of the United States in the use and management of said property, to wit, the said —— did then and there and upon said premises wrongfully, unlawfully, and knowingly, and contrary to the provisions of sections 3372, 3374, 3397, and 3400 of the Revised Statutes of the United States, remove from said manufactory, without the proper stamps denoting the tax thereon, tobacco made therein, made false and fraudulent entries of manufactures and sales of tobacco [etc.;

other charges specified], and committed other offenses against said revenue laws of the United States.

That thereafter a suit for divorce was instituted in the superior court of the city and county of San Francisco within the state and district aforesaid by —— against the said ——, her husband, and such proceedings were thereupon had that a decree of said superior court was made and entered granting the divorce and awarding said personal property to said ——, subject to the payment of certain claims alleged to have been established in said court against her, and on the —— day of ——, ——, a receiver, ——, was appointed by said court for said property.

That said receiver thereupon duly qualified and acted as such.

That thereafter the said receiver and ——, the latter having, since the appointment and with the consent of said receiver, bonded the said premises as a cigar and tobacco manufactory, committed certain violations against the said internal revenue laws of the United States, to wit: did then and there and upon the said premises [repeats the charges as above], and committed other offenses against the said revenue laws of the United States.

That heretofore, and on the —— day of ——, your petitioners, —— as such collector, and —— as such internal revenue agent, seized said personal property for the violations aforesaid of said laws, and thereafter, on the —— day of ——, said collector delivered the same into the custody of your petitioner ——, as such United States marshal, who now holds the same by virtue of such delivery.

That said receiver has not yet been discharged by said superior court.

That heretofore, and on the —— day of ——, the suit above entitled was commenced in said superior court by said receiver, —— against your petitioners for $20,000 damages for an alleged wrongful conversion of said property by reason of the seizure and acts hereinbefore mentioned.

That at all of such times your petitioners were acting under color of their said respective officers and by authority of the internal revenue laws aforesaid.

That your petitioners have been served with process in said suit, to wit: with summons and complaint inaugurating the same, and said process has been served as aforesaid within this said northern district of California, and that there has not been as yet any trial or final hearing of said suit.

Your petitioners therefore pray that, in pursuance of the statute of said United States in such case made and provided, the said suit, so commenced in said superior court of the city and county aforesaid against your petitioners, may be removed therefrom into this honorable court for trial and determination, and thereupon proceed as a cause originally commenced in the same; and that a writ of *certiorari* in this behalf, for the record and proceedings heretofore had in said cause in said superior court, may issue from this honorable court to the said superior court of said city and county as by the same statute is provided.

State and Northern District of California,—ss.

——, —— and ——, the above-named petitioners, make oath and say that the matters set forth in the foregoing petition are true in substance and in fact, the said —— making oath upon information and belief.

[Signatures.]

Subscribed and sworn to, etc.

CERTIFICATE.

I, ——, an attorney and counselor at law of the supreme court of said state, and assistant United States attorney for the northern district of California, do hereby certify that as counsel for the petitioners above named I have examined the proceedings against them in the foregoing petition mentioned, and have carefully inquired into all the matters set forth in said petition, and that I believe the same to be true.

——, Assistant United States Attorney.

§ 211. Procedure After Removal in Class Eight.

Part § 33, Jud. Code. "The cause shall thereupon be entered on the docket of the district court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the state court." (See § 209 above.)

§ 212. Certiorari and Habeas Corpus Proceedings in Class Eight—Suits Against Revenue or Congressional Officers.

Last Part § 33, Jud. Code. " . . . When the suit is commenced in the state court by summons, subpoena, petition, or other process except capias, the clerk of the district court shall issue a writ of *certiorari* to the state court, requiring it to send to the district court the record and proceedings in the cause. When it is commenced by capias or by any other similar form or proceeding by which a personal arrest is ordered, he shall issue a writ of *habeas corpus cum causa,* a duplicate of which shall be delivered to the clerk of the state court, or left at his office, by the marshal of the district or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the state court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court, and any further pro-

ceedings, trial, or judgment therein in the state court shall be void. If the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the district court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the district court that no copy of the record and proceedings therein in the state court can be obtained, the district court may allow and require the plaintiff to proceed *de novo* and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said district court. On failure of the plaintiff so to proceed, judgment of *non prosequitur* may be rendered against him, with costs for the defendant." (See § 209 above.)

FORM 21.

ORDER FOR WRIT OF CERTIORARI IN ACTION AGAINST REVENUE OFFICERS.

In the District Court, etc., of the United States.

In re the Petition of —— et al., for Writ of Certiorari in —— v. —— et al.

Upon motion of ——, Esq., assistant United States attorney, and on filing petition of —— and —— ordered, that a writ of *certiorari* issue herein to the superior court of the city and county of San Francisco, requiring said court to transmit the record and proceedings in said cause of —— v. —— et al., to this court within ten days.

Further ordered, that said writ be served by delivering to said superior court and to the clerk thereof each a certified copy and that —— be and he hereby is appointed an elisor to serve said writ of *certiorari*, —— the marshal of this district, being a party to this proceeding.

FORM 22.

WRIT OF CERTIORARI IN ACTION AGAINST REVENUE OFFICERS.

In the District Court of the United States, Within and for Northern District of California.

Northern District of California, } ss.
United States of America, }

To the Superior Court in and for the City and County of San Francisco, State of California, Greeting:

Being informed that there is now pending before you a suit wherein —— is plaintiff, and —— and —— are defendants, which said suit is

brought for damages alleged to have been suffered by said plaintiff by reason of an alleged wrongful conversion of certain property by said defendants, the said alleged wrongful conversion occurring while said defendants were in discharge of their duties as officers of the United States, under the revenue laws of the United States, and which said suit has been commenced by the service of process, to wit, summons and complaint upon said —— and —— and said suit has not yet been heard and determined.

Therefore, we being willing for certain reasons that said case and the records and proceedings heretofore had therein should be certified by said superior court and removed into our district court of the United States in and for the —— northern district of California do hereby command you that you send, without delay and within ten days, to the said district court as aforesaid, the records and proceedings in said case, so that the said district court may act thereon as of right and according to law ought to be done.

Witness, the Honorable ——, Judge of said district court, ——, this —— day of ——, A. D. ——.

[Seal] ——,

Clerk of the United States District Court, in and for the —— Northern District of California.

§ 213. Proofs of Records When Copies Refused by State Court Clerks.

§ *35, Jud. Code (re-enacting* § *645, Rev. Stats.).* "In any case where a party is entitled to copies of the records and proceedings in any suit or prosecution in a state court, to be used in any court of the United States, if the clerk of said state court, upon demand, and the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court of the United States in which such records and proceedings are needed may, on proof by affidavit that the clerk of said state court has refused or neglected to deliver copies thereof, on demand as aforesaid, direct such record to be supplied by affidavit or otherwise, as the circumstances of the case may require and allow; and thereupon such proceeding, trial, and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court." (36 Stats. 1098; 5 Fed. Stats. Ann., 2d ed., p. 387; 1 U. S. Comp. Stats. 1916, § 1017; Foster's Federal Practice, 5th ed., p. 1877.)

§ 214. Enforcement of Return of Record from State to Federal Courts.

§ 39, *Jud. Code (re-enacting 18 Stats. 472).* "In all causes removable under this chapter, if the clerk of the state court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall, on conviction thereof in the district court of the United States to which said action or proceeding was removed, be fined not more than one thousand dollars, or imprisoned not more than one year, or both. The district court to which any cause shall be removable under this chapter shall have power to issue a writ of *certiorari* to said state court commanding said state court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this chapter for the removal of the same, and enforce said writ according to law. If it shall be impossible for the parties or persons removing any cause under this chapter, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said state court refuses to furnish a copy, on payment of legal fees, or for any other reason, the district court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty, as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said district court shall require the other party to plead, and said action or proceeding shall proceed to final judgment. The said district court may make an order requiring the parties thereto to plead *de novo;* and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid." (36 Stats. 1099; 5 Fed. Stats. Ann., 2d ed., p. 466; 1 U. S. Comp. Stats. 1916, § 1021; Foster's Federal Practice, 5th ed., p. 1878; Simkins' Federal Equity Suit, 3d ed., 781.)

FORM 23.

WRIT OF CERTIORARI UNDER § 39, JUDICIAL CODE.

The President of the United States of America to the Judge of the [describe the court], Greeting:

Whereas, it has been represented to the district court of the United States for the district of ——, that a certain suit was commenced in the [state court], wherein A, a citizen and resident of the state of —— was plaintiff, and Z, a citizen of the state of —— was defendant, and that the said Z duly filed in the said state court his petition for the removal of said cause into the said district court of the United States, and filed with said petition the bond with surety required by law, and that the clerk of said state court has refused to said petitioner for the removal of said cause a copy of the record therein, though his legal fees therefor were tendered by said petitioner.

You, therefore, are hereby commanded that you forthwith certify or cause to be certified to the said district court of the United States for the ——, district of ——, a full, true, and complete copy of the record and proceedings in said cause in which the said petition for removal was filed as aforesaid, plainly and distinctly, and in as full and ample a manner as the same now remain before you, together with this writ; so that the said district court may be able to proceed thereon and do what shall appear to them of right ought to be done. Herein fail not.

Witness, the Honorable ——, Judge of said district court, and the seal of the said —— court hereto affixed, the —— day of ——, ——.

——, Clerk of said District Court.

§ 215. Remand or Dismissal of Case Fraudulently or Improperly Removed.

§ *37, Jud. Code.* "If in any suit commenced in a district court, or removed from a state court to a district court of the United States, it shall appear to the satisfaction of said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said district court shall proceed no farther therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just." (Annotated § 160, *supra.*)

FORM 24.

MOTION TO REMAND ON THE GROUND OF NO JURISDICTION, UNDER § 37, JUDICIAL CODE.

[Title of Federal Court and Cause.]

Now comes the plaintiff and moves this court to remand the above-entitled cause to the superior court in and for the county of ——, in the state of ——, on the ground that this court is without jurisdiction to hear and determine the cause. [Set out in what respects jurisdiction is lacking.]

——, Attorneys for Plaintiff.

FORM 25.

ORDER REMANDING CAUSE.

At a Stated Term, etc.

[Title of Federal Court and Cause.]

Present, The Honorable, etc.

Plaintiff's motion to remand heretofore heard and submitted to the court for consideration and decision having been fully considered, and the opinion of the court having been delivered, it is in accordance with said opinion,

Ordered that said motion be, and the same is, granted, and that this cause be, and the same is hereby, remanded to the superior court of the county of Amador, state of California, for further proceedings.

——, Judge United States District Court.

§ 216. Provisional Remedies of State Court Preserved—Bonds Given in State Suit—Valid on Removal.

§ *36, Jud. Code (drawn from 18 Stats. 471, superseding § 646, Rev. Stats.).* "When any suit shall be removed from a state court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed." (36 Stats. 1098; 5 Fed. Stats. Ann., 2d ed., p. 387; 1 U. S. Comp. Stats.

1916, § 1018; Foster's Federal Practice, 5th ed., pp. 977, 1910; Simkins' Federal Equity Suit, 3d ed., p. 789.)

§ 217. Proceedings After Removal—Generally.

§ *38, Jud. Code (re-enacting 18 Stats. 472).* "The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said state court prior to its removal." (36 Stats. 1098; 5 Fed. Stats. Ann., 2d ed., p. 446; 1 U. S. Comp. Stats. 1916, § 1020; Foster's Federal Practice, 5th ed., p. 578; Simkins' Federal Equity Suit, 3d ed., pp. 789, 790, 838.)

CHAPTER 10.

STATUTES OF LIMITATIONS.

SEC.
230. In General.
231. Capital Offenses.
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236. Seduction of Female Passenger on Vessel.
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248. Under Employers' Liability Acts and Under Act Limiting Hours of Labor.
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250. Infringement of Patent.
251. Infringement of Copyrights.
252. Liability of Stockholders of National Banks.
253. Interstate Commerce Act.
254. Suspension of Statute of Limitations Under Trading With the Enemy Act.

§ 230. In General. Unless a federal statute of limitations is prescribed for the particular suit, the state statute of limitations of the state in which the district lies will govern under § 721, Rev. Stats., quoted next page 148.[1]

[1] Michigan Ins. Bank v. Eldred, 130 U. S. 696, 32 L. Ed. 1081, 9 Sup. Ct. 691; Davie v. Briggs, 97 U. S. 637, 24 L. Ed. 1089; Elmendorf v. Taylor, 10 Wheat. (U. S.) 176, 6 L. Ed. 289; Campbell v. City of Haverhill, 155 U. S. 615, 39 L. Ed. 280, 15 Sup. Ct. 217; Lewis v. Lewis, 7 How. (U. S.) 776, 12 L. Ed. 909; Pond v. United States, 111 Fed. 989, 49 C. C. A. 582; Butler v. Poole, 44 Fed. 586.

In the absence of federal legislation, the federal courts recognize the state statutes of limitations, giving them the same construction and effect as are given by state tribunals. This applies to a state statute allowing renewal of a case after nonsuit or dismissal. (Fordham v. Hicks (S. D. Ga., N. D.), 224 Fed. 810, 813.)

§ *721, Rev. Stats.* "The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." (5 Fed. Stats. Ann., 2d ed., 1123; 3 Comp. Stats. 1916, § 1538, p. 2981.)

Special limitations for crimes and offenses are set out in §§ 231–237, *infra;* for penalties and forfeitures in §§ 238, 239, 241, 242, *infra;* suits against the United States, §§ 243, 244, *infra;* actions respecting land patents, §§ 245–247, *infra,* and other actions, §§ 248–253, *infra.*

§ 231. Capital Offenses.

§ *1043, Rev. Stats.* "No person shall be prosecuted, tried or punished for treason or other capital offense, wilful murder excepted, unless the indictment is found within three years next after such treason or capital offense is done or committed." (2 Fed. Stats. Ann., 2d ed., p. 692; 3 U. S. Comp. Stats. 1916, § 1707, p. 3577.)

§ 232. Offenses not Capital.

§ *1044, Rev. Stats.* "No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section one thousand and forty-six (R. S.) unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed. But this act shall not have effect to authorize the prosecution, trial or punishment for any offense, barred by the provisions of existing laws." (2 Fed. Stats. Ann., 2d ed., p. 692; 3 U. S. Comp. Stats. 1916, § 1708, p. 3577.)

§ 233. Unless Fleeing from Justice.

§ *1045, Rev. Stats.* "(Fleeing from justice.) Nothing in the two preceding sections shall extend to any person fleeing from justice." (2 Fed. Stats. Ann., 2d ed., p. 696; 3 U. S. Comp. Stats. 1916, § 1709, p. 3585.)

§ 234. Crimes Under Revenue and Slave-trade Laws.

§ *1046, Rev. Stats.* "No person shall be prosecuted, tried, or punished for any crime arising under the revenue laws, or the slave-trade laws of the United States, unless the indictment is found or the information is instituted within five years next after the committing of such crime." (2 Fed. Stats. Ann., 2d ed., p. 697; 3 U. S. Comp. Stats. 1916, § 1710, p. 3586.)

§ 235. Crimes Under Internal Revenue Laws.

§ *1, Act July 5, 1884, c. 225.* "That no person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, in all cases where the penalty prescribed may be imprisonment in the penitentiary, and within two years in all other cases: *Provided,* That the time during which the person committing the offense is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings; *Provided further,* That the provisions of this act shall not apply to offenses committed prior to its passage: *And provided further,* That where a complaint shall be instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district: *And provided further,* That this act shall not apply to offenses committed by officers of the United States." (23 Stats. 122; 4 Fed. Stats. Ann., 2d ed., p. 330; 3 U. S. Comp. Stats. 1916, § 1711, p. 3587.)

§ 236. Seduction of Female Passenger on Vessel.

Part § 281, Crim. Code. " . . . No conviction shall be had on the testimony of the female seduced, without other evidence,

nor unless the indictment is found within one year after the arrival of the vessel on which the offense was committed at the port of its destination." (Fed. Stats. Ann., 2d ed., title "Penal Laws"; 10 U. S. Comp. Stats. 1916, § 10,454, p. 12,900.)

§ 237. Violation of Naturalization Laws.

§ *24, Act June 29, 1906, c. 3592.* (Limit for prosecutions.) "That no person shall be prosecuted, tried, or punished for any crime arising under the provisions of this act unless the indictment is found or the information is filed within five years next after the commission of such crime." (34 Stats. 603; Fed. Stats. Ann., 2d ed., title "Naturalization"; 5 U. S. Comp. Stats. 1916, § 4380, p. 5255.)

§ 238. Penalties and Forfeitures Under Federal Laws.

§ *1047, Rev. Stats.* "No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued: *Provided,* That the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property.[2]" (3 Fed. Stats. Ann., 2d ed., p. 330; 3 U. S. Comp. Stats. 1916, § 1712, p. 3588.)

§ 239. Penalties and Forfeitures Under Customs Revenue Laws.

§ *22, Act June 22, 1874, c. 391.* "That no suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs revenue laws of the United States shall be instituted unless such suit or action shall be com-

[2] United States v. Smith etc. Co., 184 Fed. 532; United States v. Guest, 143 Fed. 456, 74 C. C. A. 590; Carter v. New Orleans etc. R. Co., 143 Fed. 99, 74 C. C. A. 293; United States v. Witteman, 152 Fed. 377, 81 C. C. A. 503; City of Atlanta v. Chattanooga Foundry & Pipe Co., 101 Fed. 900; United States v. One Dark Bay Horse, 130 Fed. 240.

menced within three years after the time when such penalty or forfeiture shall have accrued: *Provided,* That the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation." (18 Stats. 190; 2 Fed. Stats. Ann., 2d ed., p. 1183; 3 U. S. Comp. Stats. 1916, § 1713, p. 3591.)

§ 240. Settlements for Customs Duties.

§ *21, Act June 22, 1874, c. 391.* "That whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and such goods, wares, and merchandise shall have been delivered to the owner, importer, agent, or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties." (18 Stats. 190; 2 Fed. Stats. Ann., 2d ed., p. 1136; 6 U. S. Comp. Stats. 1916, § 5714, p. 6820.)

§ 241. Forfeiture or Penalty Under Copyright Laws—Criminal Prosecutions.

§ *39, Act March 4, 1909, c. 320.* "That no criminal proceeding shall be maintained under the provisions of this Act unless the same is commenced within three years after the cause of action arose." (35 Stats. 1084; 2 Fed. Stats. Ann., 2d ed., p. 608; 9 U. S. Comp. Stats. 1916, § 9560, p. 10,996.)

§ 242. Forfeiture and Damage Suits for False Claims Against United States.

§ *3494, Rev. Stats.* "Every such suit shall be commenced within six years from the commission of the act, and not afterward." (2 Fed. Stats. Ann., 2d ed., p. 210; 6 U. S. Comp. Stats. 1916, § 6415, p. 7466.)

§ 243. Claims Against United States.

§ *156, Jud. Code* (*Re-enacting* § *1069, Rev. Stats.*). "Every claim against the United States, cognizable by the court of claims, shall be forever barred, unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the secretary of the Senate or the clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: *Provided,* That the claims of married women first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively." (36 Stats. 1139; 5 Fed. Stats. Ann., 2d ed., p. 668; 2 U. S. Comp. Stats. 1916, § 1142; Foster's Federal Practice, 5th ed., p. 2314.)

See also subd. 20, § 24, Jud. Code, quoted in § 94 *supra.*

§ 244. Recovery of Taxes Wrongfully Collected.

§ *3227, Rev. Stats.* "No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: *Provided,* That actions for such claims which accrued prior to June 6, 1872, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action thereon may be brought within one year after such decision, and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section." (3 Fed. Stats. Ann., 2d ed., p. 1037; 6 U. S. Comp. Stats. 1916, § 5950, p. 6986.)

§ *3228, Rev. Stats.* "*All claims for the refunding* of any internal tax alleged to have been erroneously or illegally as-

sessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: *Provided,* That claims which accrued prior to June 6, 1872, may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date." (3 Fed. Stats. Ann., 2d ed., p. 1037; 6 U. S. Comp. Stats. 1916, § 5951, p. 6991.)

§ 245. Suits by United States to Vacate Land Patents.

Part § 8, Act March 3, 1891, c. 561. "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. (26 Stats. 1099; Fed. Stats. Ann., 2d ed., title "Public Lands"; 5 U. S. Comp. Stats. 1916, § 5114, p. 6065.)

§ 246. Suits by United States to Vacate Railway or Wagon Road Patents.

§ 1, March 2, 1896, c. 39. "That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided,* That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the government or

its officers to withdraw the same from sale or entry." (29 Stats. 42; Fed. Stats. Ann., 2d ed., title "Public Lands"; 5 U. S. Comp. Stats. 1916, § 4901, p. 5893.)

§ 247. Suits by Patentee of Lands Patented to Indians.

§ *1, Act May 31, 1902, c. 946.* "That in all actions brought in any state court or United States court by any patentee, his heirs, grantees, or any person claiming under such patentee, for the possession or rents or profits of lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has been approved by the Secretary of the Interior to the land sought to be recovered, the statutes of limitations of the states in which said land is situate shall be held to apply, and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the statutes of said state the same as if such action had been brought for the recovery of land patented to others than members of any tribe of Indians." (32 Stats. 284; 3 Fed. Stats. Ann., 2d ed., p. 847; 5 U. S. Comp. Stats. 1916, § 4216, p. 5013.)

§ 248. Under Employers' Liability Acts and Under Act Limiting Hours of Labor.

Part § *6, Act April 22, 1908, c. 149.* "That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued." (35 Stats. 66; Fed. Stats. Ann., 2d ed., title "Railroads"; 8 U. S. Comp. Stats. 1916, § 8662, p. 9432.)

Part § *1, Act May 4, 1916, c. 109.* In prosecutions under the act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon "no suit shall be brought after the expiration of one year from the date of such violation." (39 Stats. 61; Pamphlet Supp., Fed. Stats. Ann. No. 7, p. 37; 8 U. S. Comp. Stats. 1916, part § 8679, p. 9455.)

§ 249. Action for Neglect to Prevent Conspiracy Against Civil Rights.

Part § *1981, Rev. Stats.* " . . . But no action under the provision of this section shall be sustained which is not com-

menced within one year after the cause of action has accrued." (2 Fed. Stats. Ann., 2d ed., p. 133; 4 U. S. Comp. Stats. 1916, § 3934, p. 4805.)

§ 250. Infringement of Patent.

Part § 4921, Rev. Stats., as amended § 6, Act March 3, 1897, c. 391. " . . . But in any suit or action brought for the infringement of any patent, there shall be no recovery of profits or damages for any infringement committed more than six years before the filing of the bill of complaint or the issuing of the writ in such suit or action, and this provision shall apply to existing causes of action." (Fed. Stats. Ann., 2d ed., title "Patents"; 8 U. S. Comp. Stats. 1916, § 9467, p. 10,490.)

§ 251. Infringement of Copyrights. Actions for infringements of copyrights, except in a case of forfeiture or penalty under copyright laws governed by § 39, act March 4, 1909, c. 320 (§ 241 above), are governed by state statutes of limitation. (Brady v. Daly, 175 U. S. 158, 44 **L. Ed.** 109, 20 Sup. Ct. 66.)

§ 252. Liability of Stockholders of National Banks. Under § 2 of the Act June 30, 1876, c. 156, 19 Stats. 63, Fed. Stats. Ann., 2d ed., title "National Banks," 9 U. S. Comp. Stats. 1916, § 9807, p. 12,039, this action is governed by the state statute of limitations, but it does not begin to run until the amount of the stockholders' liability has been ascertained and assessed by the comptroller of currency.[3]

§ 253. Interstate Commerce Act.

Part § 16, Act February 4, 1887, c. 104, as amended § 5, Act March 2, 1889, c. 382, and § 5, Act June 29, 1906, c. 3591, and § 13, Act June 18, 1910, c. 309. "All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit (now district)

3 Rankin v. Barton, 199 U. S. 228, 50 **L. Ed.** 163, 26 Sup. Ct. 29. See, also, McClaine v. Rankin, 197 U. S. 154, 3 **Ann. Cas.** 500, 49 **L. Ed.** 702, 25 **Sup. Ct.** 410.

court or state court within one year from the date of the order, and not after." (4 Fed. Stats. Ann., 2d ed., p. 477; 8 U. S. Comp. Stats. 1916, § 8584, part (2), p. 9222.)

§ 254. Suspension of Statute of Limitations Under Trading With the Enemy Act.

Part § 8, Act October 6, 1917, c. ——. "(c) The running of any statute of limitations shall be suspended with reference to the rights or remedies on any contract or obligation entered into prior to the beginning of the war between parties neither of whom is an enemy or ally of enemy, and containing any promise to pay or liability for payment which is evidenced by drafts or other commercial paper drawn against or secured by funds or other property situated in an enemy or ally of enemy country, and no suit shall be maintained on any such contract or obligation in any court within the United States until after the end of the war, or until the said funds or property shall be released for the payment or satisfaction of such contract or obligation: *Provided, however,* That nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law." (Pamphlet Supp., Fed. Stats. Ann. No. 12, p. 131.)

CHAPTER 11.

EVIDENCE.

SEC.

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316. Same—Payment of Special Taxes.

§ 270. In General. Equity Rule 46 provides that "in all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass on the admissibility of all evidence offered as in actions at law. . . . " (See chapter 50, *post*.)

§ 861, Rev. Stats. (quoted § 595, *post*), provides that "the mode of proof in the trials of actions at common law shall be by oral testimony and by examination of witnesses in open court, except as hereinafter provided."

§ 721, Rev. Stats. (§ 230, *supra*), provides that, except as otherwise provided, the laws of the several states "shall be regarded as the rules of decision in trials at common law."

The last-mentioned section has been held to apply to rules of evidence prescribed by the laws of the state in which the federal court was sitting.[1] The laws of the state relating to evidence means not only the statutes of the state, but also the decisions of its highest

[1] Parker v. Moore, 111 Fed. 470.

courts respecting rules of evidence,[2] but not as to common-law rules of evidence.[3]

The decided tendency in both law and equity is to conform to state rules of evidence as is indicated by the new rule 46, above mentioned, and recent amendment § 858, Rev. Stats., as to competency of witnesses. (§ 330, *post.*)

The federal courts do not, however, follow the state practice, allowing the examination of a party before trial,[4] except in ordering a surgical examination of the person of the plaintiff in an action for personal injuries,[5] and not then when there is no state statute.[6]

Discovery by the production of books and papers in common-law actions is governed by § 724, Rev. Stats. (§ 571, *post*), and in equity by Equity Rule 58 (Chapter 43, *post*).

State laws have been followed as to printed copies of state laws being *prima facie* evidence thereof.[7] Section 905, Rev. Stats. (§ 274 below), provides for the authentication of state laws, although it has not been held mandatory and the statutes of Pennsylvania were admitted in the District of Columbia, though not so authenticated.[8]

So, also, the state law was followed as to exemption from process of a witness in attendance on court.[9]

But state laws will not be followed where the federal statutes make other provisions.[10]

This chapter contains a number of special federal statutes on evidence.

2 Nashua Savings Bank v. Anglo-American Land etc. Co., 189 U. S. 228, 47 L. Ed. 782, 23 Sup. Ct. 517.
3 Union Pac. R. Co. v. Yates, 79 Fed. 588, 40 L. R. A. 553, 25 C. C. A. 103.
4 Ex parte Fisk, 113 U. S. 713, 28 L. Ed. 1117, 5 Sup. Ct. 724.
5 Camden etc. R. Co. v. Stetson, 177 U. S. 172, 44 L. Ed. 721, 20 Sup. Ct 617
6 Union Pac R. Co. v. Botsford, 141 U. S. 250, 35 L. Ed. 734, 11 Sup. Ct. 1000.
7 Beatrice v. Edminson, 117 Fed. 427, 54 C. C. A. 601.
8 Commercial & Farmers' Bank v. Patterson, 2 Cranch, 346, Fed. Cas. No. 3056.
9 Ex parte Levi, 28 Fed. 651.
10 Potter v. National Bank, 102 U. S. 165, 26 L. Ed. 111.

§ 271. Statutes of United States—Evidence of—Little and Brown's Edition.

§ *908, Rev. Stats.* "The edition of the Laws and Treaties of the United States, published by Little & Brown, shall be competent evidence of the several public and private acts of Congress, and of the several treaties therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several states, without any further proof or authentication thereof." (Fed. Stats. Ann., 2d ed., title "Statutes"; 3 U. S. Comp. Stats. 1916, § 1522.)

§ 272. Same—Supplement of Revised Statutes.

§ *3 of Act April 9, 1890, c. 73.* "The publication herein authorized shall be taken to be *prima facie* evidence of the laws therein contained, but shall not change nor alter any existing law, nor preclude reference to nor control in case of any discrepancy, the effect of any original act passed by Congress." (26 Stats. 50; Fed. Stats. Ann., 2d ed., title "Statutes"; 3 U. S. Comp. Stats. 1916, § 1531.)

§ 273. Same—Richardson's Supplement of Revised Statutes.

Part Joint Resolution June 7, 1880, No. 44. "The publication herein authorized shall be taken to be *prima facie* evidence of the laws therein contained in all the courts of the United States, and of the several states and territories therein; but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original acts as passed by Congress: *Provided,* That nothing herein contained shall be construed to change or alter any existing law." (21 Stats. 308; Fed. Stats. Ann., 2d ed., title "Statutes"; 3 U. S. Comp. Stats. 1916, § 1529.)

§ 274. Proof State and Foreign Legislative Acts and State Court Records and Proceedings.

§ *905, Rev. Stats.* "The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The rec-

ords and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." (3 Fed. Stats. Ann., 2d ed., p. 212; 3 U. S. Comp. Stats. 1916, § 1519, p. 2431.)

§ 275. Exemplified Copies Records of Public Offices, not Appertaining to a Court in States and Territories.

§ *906, Rev. Stats.* "All records and exemplifications of books, which may be kept in any public office of any state or territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other state or territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor or secretary of state, the chancellor or keeper of the great seal of the state, or territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the state, territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state, territory, or country, as aforesaid, from which they are taken." (3 Fed. Stats. Ann., 2d ed., p. 220; 3 U. S. Comp. Stats. 1916, § 1520, p. 2475.)

§ 276. Copies of Foreign Records Filed in Department Offices Relating to Land Titles in United States.

§ *907, Rev. Stats.* "It shall be lawful for any keeper or person having the custody of laws, judgments, orders, decrees, journals, correspondence, or other public documents of any foreign government or its agents, relating to the title to lands claimed by or under the United States, on the application of the head of one of the departments, the Solicitor of the Treasury, or the Commissioner of the General Land Office, to authenticate copies thereof under his hand and seal, and to certify them to be correct and true copies of such laws, judgments, orders, decrees, journals, correspondence, or other public documents, respectively; and when such copies are certified by an American minister or consul, under his hand and seal of office, to be true copies of the originals, they shall be sealed up by him and returned to the Solicitor of the Treasury, who shall file them in his office, and cause them to be recorded in a book to be kept for that purpose. A copy of any such law, judgment, order, decree, journal, correspondence, or other public document, so filed, or of the same so recorded in said book, may be read in evidence in any court, where the title to land claimed by or under the United States may come into question, equally with the originals." (3 Fed. Stats. Ann., 2d ed., p. 221; 3 U. S. Comp. Stats. 1916, § 1521.)

§ 277. Copies—Extracts from Journals of Congress Certified.

§ *895, Rev. Stats.* "Extracts from the journals of the Senate, or of the House of Representatives, and of the Executive Journal of the Senate when the injunction of secrecy is removed, certified by the secretary of the Senate or by the clerk of the House of Representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court." (3 Fed. Stats. Ann., 2d ed., p. 208; 3 U. S. Comp. Stats. 1916, § 1508.)

§ 278. Pamphlet Copies of Statutes and Bound Copies of Acts.

Part § 73, Act January 12, 1895, c. 23. "The pamphlet copies of the statutes and the bound copies of the acts of each Congress shall be legal evidence of the laws and treaties

therein contained in all the courts of the United States and of the several states therein." (28 Stats. 615; Fed. Stats. Ann., 2d ed., title "Statutes"; 7 U. S. Comp. Stats. 1916, § 7073.)

§ 279. Printed and Bound Copies of Acts.

§ *8, Act June 20, 1874, c. 333.* "The said printed copies of the said acts of each session and of the said bound copies of the acts of each Congress shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States and of the several states therein. (18 Stats. 113; Fed. Stats. Ann., 2d ed., title "Statutes"; 3 U. S. Comp. Stats. 1916, § 1525.)

§ 280. Copies—Lost or Destroyed Judicial Records.

§ *899, Rev. Stats.* "When the record of any judgment, decree, or other proceeding of any court of the United States is lost or destroyed, any party or person interested therein may, on application to such court, and on showing to its satisfaction that the same was lost or destroyed without his fault, obtain from it an order authorizing such defect to be supplied by a duly certified copy of the original record, where the same can be obtained; and such certified copy shall thereafter have, in all respects, the same effect as the original record would have had." (3 Fed. Stats. Ann., 2d ed., p. 210; 3 U. S. Comp. Stats. 1916, § 1513.)

§ 281. Restoration of Lost or Destroyed Judicial Records.

§ *900, Rev. Stats.* "When any such record is lost or destroyed, and the defect cannot be supplied as provided in the preceding section, any party or person interested therein may make a written application to the court to which the record belonged, verified by affidavit, showing such loss or destruction; that the same occurred without his fault or neglect; that certified copies of such record cannot be obtained by him; and showing also the substance of the record so lost or destroyed, and that the loss or destruction thereof, unless supplied, will or may result in damage to him. The court shall cause said application to be entered of record, and a copy of it shall be served personally upon every person interested therein, to-

gether with written notice that on a day therein stated, which shall not be less than sixty days after such service, said application will be heard; and if, upon such hearing, the court is satisfied that the statements contained in the application are true, it shall make and cause to be entered of record an order reciting the substance and effect of said lost or destroyed record. Said order shall have the same effect, so far as concerns the party or person making such application and the persons served as above provided, but subject to intervening rights, which the original record would have had if the same had not been lost or destroyed." (3 Fed. Stats. Ann., 2d ed., p. 210; 3 U. S. Comp. Stats. 1916, § 1514.)

§ 282. Copies—Lost Supreme Court Record.

§ *901, Rev. Stats.* "When any cause has been removed to the Supreme Court, and the original record thereof is afterward lost, a duly certified copy of the record remaining in said court may be filed in the court from which the cause was removed, on motion of any party or person claiming to be interested therein; and the copy so filed shall have the same effect as the original record would have had if the same had not been lost or destroyed." (3 Fed. Stats. Ann., 2d ed., p. 210; 3 U. S. Comp. Stats. 1916, § 1515.)

§ 283. Restoration of Records—Service of Notice on Nonresidents.

§ *902, Rev. Stats.* "In any proceedings in conformity with law to restore the records of any court of the United States which have been or may be hereafter lost or destroyed, the notice required may be served on any nonresident of the district in which such court is held anywhere within the jurisdiction of the United States, or in any foreign country; the proof of service of such notice, if made in a foreign country, to be certified by a minister or consul of the United States in such country, under his official seal." (3 Fed. Stats. Ann., 2d ed., p. 211; 3 U. S. Comp. Stats. 1916, § 1516.)

§ 284. Copies — Lost Returns and Official Papers — Judicial Officers.

§ *903, Rev. Stats.* "A certified copy of the official return, or any other official paper of the United States attorney,

marshal, or clerk, or other certifying or recording officer of any court of the United States, made in pursuance of law, and on file in any department of the government, relating to any cause or matter to which the United States was a party in any such court, the record of which has been or may be lost or destroyed, may be filed in the court to which it appertains, and shall have the same force and effect as if it were an original report, return, paper, or other document made to or filed in such court; and in any case in which the names of the parties and the date and amount of judgment or decree shall appear from such return, paper, or document, it shall be lawful for the court in which they are filed to issue the proper process to enforce such decree or judgment, in the same manner as if the original record remained in said court. And in all cases where any of the files, papers, or records of any court of the United States have been or shall be lost or destroyed, the files, records, and papers which, pursuant to law, may have been or may be restored or supplied in place of such records, files, and papers, shall have the same force and effect, to all intents and purposes, as the originals thereof would have been entitled to." (3 Fed. Stats. Ann., 2d ed., p. 211; 3 U. S. Comp. Stats. 1916, § 1517.)

§ 285. Restoration of Records in Which United States are Interested by United States Attorneys.

§ *904, Rev. Stats.* "That whenever any of the records or files in which the United States are interested of any court of the United States have been or may be lost or destroyed, it shall be the duty of the attorney of the United States for the district court to which such files and records belong, so far as the judges of such courts respectively shall deem it essential to the interests of the United States that such records and files to (sic) be restored or supplied, to take such steps, under the direction of said judges, as may be necessary to effect such restoration or substitution, including such dockets, indices, and other books and papers as said judge (s) shall think proper. Said judges may direct the performance, by the clerks of said courts respectively and by the United States attorneys, of any duties incident thereto; and said clerks and attorneys shall be allowed such compensation for services in the matter and for lawful disbursements

as may be approved by the Attorney General of the United States, upon a certificate by the judges of said courts stating that such claim for services and disbursements is just and reasonable; and the sum so allowed shall be paid out of the judiciary fund." (3 Fed. Stats. Ann., 2d ed., p. 212; 3 U. S. Comp. Stats. 1916, § 1518.)

§ 286. Copies—Executive Department Records, etc.

§ *882, Rev. Stats.* "Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof." (3 Fed. Stats. Ann., 2d ed., p. 197; 3 U. S. Comp. Stats. 1916, § 1494.)

§ 287. Copies—Solicitor of the Treasury Records, etc.

§ *883, Rev. Stats.* "Copies of any documents, records, books, or papers in the office of the solicitor of the Treasury, certified by him under the seal of his office, or, when his office is vacant, by the officer acting as solicitor for the time, shall be evidence equally with the originals." (3 Fed. Stats. Ann., 2d ed., p. 199; 3 U. S. Comp. Stats. 1916, § 1495.)

§ 288. Copies—Comptroller of the Currency Records, etc.

§ *884, Rev. Stats.* "Every certificate, assignment, and conveyance executed by the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer." (3 Fed. Stats. Ann., 2d ed., p. 199; 3 U. S. Comp. Stats. 1916, § 1496.)

§ 289. Copies—National Bank Organization Certificates.

§ *885, Rev. Stats.* "Copies of the organization certificate of any national banking association, duly certified by the Comptroller of the Currency, and authenticated by his seal of office, shall be evidence in all courts and places within

the jurisdiction of the United States of the existence of the association, and of every matter which could be proved by the production of the original certificate." (3 Fed. Stats. Ann., 2d ed., p. 199; 3 U. S. Comp. Stats. 1916, § 1497.)

§ 290. Copies—Bonds, Contracts, and Other Papers of United States in Settlement of Accounts With Government.

Part § 886, Rev. Stats. " . . . And all copies of bonds, contracts, or other papers relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the register or by such auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the Department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court: *Provided,* That where suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum,* or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit." (3 Fed. Stats. Ann., 2d ed., p. 199; 3 U. S. Comp. Stats. 1916, § 1498.)

§ 291. Copies—Treasury, War, Navy, Records in Suits Against Delinquents.

Part § 886, Rev. Stats. "When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the register and authenticated under the seal of the Department, or, when the suit involves the accounts of the War or Navy Departments, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the Treasury Department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. . . . " (3 Fed. Stats. Ann., 2d ed., p. 199; 3 U. S. Comp. Stats. 1916, § 1498.)

§ 292. Same—Certification of Copies to be Made by Secretary or an Assistant Secretary of the Treasury Under Seal of Department.

§ *10, Act March 2, 1895, c. 177, amending* § *17, Act July 31, 1894, c. 174.* "The transcripts from the books and proceedings of the Department of the Treasury and the copies of bonds, contracts and other papers provided for in section eight hundred and eighty-six of the Revised Statutes shall hereafter be certified by the Secretary or an Assistant Secretary of the Treasury under the seal of the Department." (3 Fed. Stats. Ann., 2d ed., p. 227; 3 U. S. Comp. Stats. 1916, § 1499.)

§ 293. Copies—Treasury Department Books and Proceedings in Embezzlement Suits.

§ *887, Rev. Stats.* "Upon the trial of any indictment against any person for embezzling public moneys, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury Department, as provided by the preceding section." (3 Fed. Stats. Ann., 2d ed., p. 203; 3 U. S. Comp. Stats. 1916, § 1500.)

§ 294. Copies—Department of the Interior.

§ *888, Rev. Stats.* "A copy of any return of a contract returned and filed in the returns-office of the Department of the Interior, as provided by law, when certified by the clerk of the said office to be full and complete, and when authenticated by the seal of the Department, shall be evidence in any prosecution against any officer for falsely and corruptly swearing to the affidavit required by law to be made by such officer in making his return of any contract, as required by law, to said returns-office." (3 Fed. Stats. Ann., 2d ed., p. 204; 3 U. S. Comp. Stats. 1916, § 1501.)

Under Reclamation Act, Part § *4, Act Aug. 9, 1912, c. 278:* " . . . the Secretary of the Interior shall make provision for furnishing copies of duly authenticated records of entries upon payment of reasonable fees, which copies shall be admissible in evidence, as are copies authenticated under section eight hundred and eighty-eight of the Revised Statutes." (37 Stats.

267; Fed. Stats. Ann., 2d ed., title "Waters"; 5 U. S. Comp. Stats. 1916, § 4731, p. 5785.)

Copies of Records—Interior Department and Its Several Bureaus. §§ 3 and 4 Act Aug. 24, 1912, c. 370.

§ 3. "That all authenticated copies furnished under this act shall be admitted in evidence equally with the originals thereof.

§ 4. "That all officers who furnish authenticated copies under this act shall attest their authentication by the use of an official seal, which is hereby authorized for that purpose." (37 Stats. 492; 3 Fed. Stats. Ann., 2d ed., p. 951; 1 U. S. Comp. Stats. 1916, § 677.)

§ 295. Copies—Postoffice Records.

§ *889, Rev. Stats.* "Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the sixth auditor, and transcripts from the money-order account books of the Postoffice Department, when certified by the sixth auditor under the seal of his office, shall be admitted as evidence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits." (3 Fed. Stats. Ann., 2d ed., p. 204; 3 U. S. Comp. Stats. 1916, § 1502.)

§ 296. Copy—Postoffice Department Demand on Postmasters.

§ *890, Rev. Stats.* "In all suits for the recovery of balances due from postmasters, a copy, duly certified under the seal of the sixth auditor, of the statement of any postmaster, special agent, or other person, employed by the Postmaster General or the auditor for that purpose, that he has mailed a letter to such delinquent postmaster at the postoffice where the indebtedness accrued, or at his last usual place of abode; that a sufficient time has elapsed for said letter to have reached its destination in the ordinary course of the mail; and that payment of such balance has not been received,

within the time designated in his instructions, shall be received as sufficient evidence in the courts of the United States, or other courts, that a demand has been made upon the delinquent postmaster; but when the account of a late postmaster has been once adjusted and settled, and a demand has been made for the balance appearing to be due, and afterward allowances are made or credits entered, it shall not be necessary to make a further demand for the new balance found to be due." (3 Fed. Stats. Ann., 2d ed., p. 205; 3 U. S. Comp. Stats. 1916, § 1503.)

§ 297. Copies—Land Office Records—Certification of.

By Commissioner or Principal Clerk.

§ *891, Rev. Stats.* "Copies of any records, books, or papers in the General Land Office, authenticated by the seal and certified by the Commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record." (3 Fed. Stats. Ann., 2d ed., p. 205; 3 U. S. Comp. Stats. 1916, § 1504.)

§ *2469, Rev. Stats.* "The Commissioner of the General Land Office shall cause to be prepared, and shall certify, under the seal of the office, such copies of records, books, and papers on file in his office as may be applied for, to be used in evidence in courts of justice." (3 Fed. Stats. Ann., 2d ed., p. 222; 1 U. S. Comp. Stats. 1916, § 709.)

§ *2470, Rev. Stats.* "Literal exemplifications of any records which have been or may be granted in virtue of the preceding section shall be deemed of the same validity in all proceedings, whether at law or in equity, wherein such exemplifications are adduced in evidence, as if the names of the officers signing and countersigning the same had been fully inserted in such record." (3 Fed. Stats. Ann., 2d ed., p. 222; 1 U. S. Comp. Stats. 1916, § 710.)

By Registers and Receivers of Land Offices.

Act Mar. 22, 1904, c. 748. "The transcripts thus furnished, when duly certified to by them, shall be admitted as evidence

in all courts of the United States and the territories thereof, and before all officials authorized to receive evidence, with the same force and effect as the original records." (33 Stats. 144; Fed. Stats. Ann., 2d ed., title "Public Lands"; 5 U. S. Comp. Stats. 1916, § 4474.)

§ 298. Subpoena Duces Tecum to Register of Land Office.

Act April 19, 1904, c. 1398. "Whenever the register of any United States land office shall be served with a *subpoena duces tecum* or other valid legal process requiring him to produce, in any United States court or in any court of record of any state, the original application for entry of public lands or the final proof of residence and cultivation or any other original papers on file in the General Land Office of the United States on which a patent to land has been issued or which furnish the basis for such patent, it shall be the duty of such register to at once notify the Commissioner of the General Land Office of the service of such process, specifying the particular papers he is required to produce, and upon receipt of such notice from any register of a United States land office the Commissioner of the General Land Office shall at once transmit to such register the original papers specified in such notice, and which such register is required to produce, and to attach to such papers a certificate, under seal of his office, properly authenticating them as the original papers upon which patent was issued; and such papers so authenticated shall be received in evidence in all courts of the United States and in the several state courts of the states of the Union: *Provided,* That the Secretary of the Interior shall make rules and regulations to secure the return of such documents to the General Land Office, after use in evidence, without cost to the United States." (33 Stats. 186; Fed. Stats. Ann., 2d ed., title "Public Lands"; 1 U. S. Comp. Stats. 1916, § 701.)

§ 299. Copies—Commissioner of Indian Affairs—Certification of.

Part § 3, Act July 26, 1892, c. 256. "Copies of any public documents, records, books, maps, or papers belonging to or on the files of said office authenticated by the seal and certified

by the Commissioner thereof, or by such officer as may, for the time being, be acting as or for such Commissioner, shall be evidence equally with the originals thereof." (3 Fed. Stats. Ann., 2d ed., p. 749; 1 U. S. Comp. Stats. 1916, § 720.)

§ 300. Copies—Patent Office Records, Letters Patent, etc.

§ *892, Rev. Stats.* "Written or printed copies of any records, books, papers, or drawings belonging to the Patent Office, and of letters patent authenticated by the seal and certified by the Commissioner or acting Commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor, and paying the fee required by law, shall have certified copies thereof." (3 Fed. Stats. Ann., 2d ed., p. 206; 3 U. S. Comp. Stats. 1916, § 1505.)

§ 301. Copies—Foreign Letters Patent.

§ *893, Rev. Stats.* "Copies of the specifications and drawings of foreign letters patent, certified as provided in the preceding section, shall be *prima facie* evidence of the fact of the granting of such letters patent, and of the date and contents thereof." (3 Fed. Stats. Ann., 2d ed., p. 207; 3 U. S. Comp. Stats. 1916, § 1506.)

§ 302. Copies—Printed Copies of Specifications and Drawings of Patents.

§ *894, Rev. Stats.* "The printed copies of specifications and drawings of patents, which the Commissioner of Patents is authorized to print for gratuitous distribution, and to deposit in the capitols of the states and territories, and in the clerk's offices of the district courts, shall, when certified by him and authenticated by the seal of his office, be received in all courts as evidence of all matters therein contained." (3 Fed. Stats., Ann., 2d ed., p. 208; 3 U. S. Comp. Stats. 1916, § 1507.)

§ 303. Copies—Patent Office Records—Trademarks.

Part § 11 of Act Feb. 20, 1905, c. 592. " . . . Written or printed copies of any records, books, papers, or drawings relating to trademarks belonging to the Patent Office, and of

certificates of registration, authenticated by the seal of the Patent Office and certified by the Commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor and paying the fee required by law shall have certified copies thereof." (33 Stats. 727; Fed. Stats. Ann., 2d ed., title "Trademarks"; 9 U. S. Comp. Stats. 1916, § 9496.)

§ 304. Copies—United States Consular Records.

§ *896, Rev. Stats.* "Copies of all official documents and papers in the office of any consul, vice consul, or commercial agent of the United States, and of all official entries in the books or records of any such office, certified under the hand and seal of such officer, shall be admitted in evidence in the courts of the United States." (3 Fed. Stats. Ann., 2d ed., p. 209; 3 U. S. Comp. Stats. 1916, § 1509.)

§ 305. Copies—United States Clerk's New Records in Certain States.

§ *897, Rev. Stats.* "The transcripts into new books, made by the clerks of the district courts in the several districts of Texas, Florida, Wisconsin, Minnesota, Iowa, and Kansas, in pursuance of the act of June twenty-seven, eighteen hundred and sixty-four, chapter one hundred and sixty-five, from the records and journals transferred by them respectively, under the said act, to the clerks of the circuit courts in said districts, when certified by the clerks respectively making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said circuit courts, respectively, of transcripts of any of the books or papers so transferred to them, shall be received in evidence with the like effect as if made by the clerk of the court in which the proceedings were had." (3 Fed. Stats. Ann., 2d ed., p. 209; 3 U. S. Comp. Stats. 1916, § 1510.)

§ 306. Copies—United States Clerks' New Records—North Carolina.

§ *898, Rev. Stats.* "The transcripts into new books made by the clerks of the circuit and district courts for the west-

ern district of North Carolina, in pursuance of the act of June four, eighteen hundred and seventy-two, chapter two hundred and eighty-two, when certified by the clerks respectively making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said circuit and district courts respectively, of transcripts of any of the said transcribed records, shall also be received in evidence with the like effect as if made by the proper clerk from the originals from which such records were transcribed." (3 Fed. Stats. Ann., 2d ed., p. 209; 3 U. S. Comp. Stats. 1916, § 1511.)

§ 307. Judicial Notice Taken of the Seal of the Department of Commerce and Labor.

Part § 1, Act Feb. 14, 1903, c. 552. "The said Secretary shall cause a seal of office to be made for the said department of such device as the President shall approve, and judicial notice shall be taken of the said seal." (32 Stats. 825; 2 Fed. Stats. Ann., 2d ed., p. 475; 1 U. S. Comp. Stats. 1916, § 853.)

Part § 17, Act Feb. 4, 1887, as Amended by § 2, Act Aug. 19, 1917, c. ——. "The commission shall have an official seal, which shall be judicially noticed." (Pamphlet Supp., Fed. Stats. Ann. No. 12, p. 81, title "Interstate Commerce.")

§ 308. Burden of Proof—Seizure Cases Under Customs Duties Laws.

§ *909, Rev. Stats.* "(Burden of proof, when it lies on claimant in seizure cases.) In suits or informations brought, where any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant: *Provided,* That probable cause is shown for such prosecution, to be judged of by the court." (3 Fed. Stats. Ann., 2d ed., p. 322; 3 U. S. Comp. Stats. 1916, § 1532.)

§ 309. Reports of Investigations of Accidents from Failure of Boilers—Not Admissible in Damage Suits.

Part § 8, Act Feb. 17, 1911, c. 103. "Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation." (36 Stats. 916; Fed. Stats. Ann., 2d ed., title "Railroads"; 8 U. S. Comp. Stats. 1916, § 8637 (2).)

§ 310. Government Paramount Title does not Affect Mining Titles—Possessory Action.

§ 910, Rev. Stats. "No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States." (Fed. Stats. Ann., 2d ed., title "Mineral Lands, Mines and Mining"; 3 U. S. Comp. Stats. 1916, § 1533.)

§ 311. Publication of Interstate Commerce Reports and Decisions as Evidence.

Part § 14, Act Feb. 4, 1887, c. 104, 24 Stats. 384, as amended § 4, Act March 2, 1889, c. 382, 25 Stats. 859, and as amended § 3, Act June 29, 1906, c. 3591, 34 Stats. 589. " . . . The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several states without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports." (4 Fed. Stats. Ann., 2d ed., p. 457; 8 U. S. Comp. Stats. 1916, § 8582 (3), p. 9195.)

§ 312. Proof of Signature and Handwriting.

Act February 26, 1913, c. 79. "In any proceeding before a court or judicial officer of the United States where the

genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness." (37 Stats. 683; 3 Fed. Stats. Ann., 2d ed., p. 227; 3 U. S. Comp. Stats. 1916, § 1471, Maxey v. U. S., 207 Fed. 327, 125 C. C. A. 77; Short v. U. S., 221 Fed. 248, 137 C. C. A. 104.)

§ 313. Things as Evidence Under Alaska Prohibition Laws.

Part § 17, Act Feb. 14, 1917, c. 53. " . . . if any such be found, to take into his possession and safely keep, to be produced as evidence when required, all alcoholic liquors and all the means of dispensing the same, also all the paraphernalia or part of the paraphernalia of a barroom or other alcoholic liquor establishment, and any United States internal revenue tax receipt or certificate for the manufacture or sale of alcoholic liquor, effective for the period of time covering the alleged offense, and forthwith report all the facts to the district attorney or his deputy, and such alcoholic liquor or the means for dispensing same, or the paraphernalia of a barroom or other alcoholic liquor establishment, or any United States internal-revenue tax receipt or certificate for the sale of alcoholic liquor, effective as aforesaid, shall be *prima facie* evidence of the violation of the provisions of this Act." (Pamphlet Supp., Fed. Stats. Ann., Nos., 9–10, p. 9, title "Alaska"; U. S. Comp. Stats. § 3643j, Adv. Sheets, 238 Fed. No. 5, p. 9.)

§ *26, Act Feb. 14, 1917, c. 53. Internal Revenue Special Tax Stamp or Receipt—Use as Evidence.* "That the issuance by the United States of any internal revenue special tax stamp or receipt to any person as a dealer in intoxicating liquors shall be *prima facie* evidence of the sale of intoxicating liquors by such person during the time the stamp or receipt is in force and effect.

"A copy of such stamp or receipt or of the record of the issuance thereof, certified to by a United States internal-revenue officer having charge of such record, is admissible as evidence in like case and with like effect as the original stamp or receipt." (Pamphlet Supp., Fed. Stats. Ann., Nos. 9–10,

p. 10, title "Alaska"; U. S. Comp. Stats. § 3643nn, Adv. Sheets, 238 Fed. No. 5, p. 12.)

§ 314. Sufficiency of Evidence to Convict Under Alaska Prohibition Laws.

§ *18, Act Feb. 14, 1917, c. 53.* "That it shall not be necessary, in order to convict any person, company, house, association, copartnership, club, or corporation, his, its, or their agents, officers, clerks, or servants of manufacturing, importing, or selling alcoholic liquors, to prove the actual manufacture, importing, sale, delivery of, or payment for any alcoholic liquors, but the evidence of having or keeping them in hand, stored or deposited, taking orders for, or offering to sell or barter, or exchanging them for goods or merchandise, or giving them away, shall be sufficient to convict; nor shall it be necessary in a warrant, information, or indictment to specify the particular kind of alcoholic liquor which is made the subject of a charge of violation of this Act." (Pamphlet Supp., Fed. Stats. Ann., Nos. 9–10, p. 9, title "Alaska"; U. S. Comp. Stats., § 3643jj, Adv. Sheets, 238 Fed. No. 5, p. 10.)

§ 315. Prima Facie Evidence Under District of Columbia Prohibition Law.

Part § 10, Act of Mch. 3, 1917, c. 165. Sale of Intoxicating Liquors—District of Columbia; Evidence. " . . . to take into his possession and safely keep, to be produced as evidence when required, all alcoholic liquors and all the means of dispensing the same, also all the paraphernalia or part of the paraphernalia of a barroom or other alcoholic liquor establishment, and any United States internal revenue tax receipt or certificate for the manufacture or sale of alcoholic liquor effective for the period of time covering the alleged offense, and forthwith report all the facts to the corporation counsel of the District of Columbia, and such alcoholic liquor or the means for dispensing same, or the paraphernalia of a barroom or other alcoholic liquor establishment, or any United States internal revenue tax receipt or certificate for the sale of alcoholic liquor effective as aforesaid, shall be *prima facie* evidence of the violation of the provisions of this Act." (U. S. Comp. Stats., §§ 3369 ii, Adv. Sheets, 239 Fed. No. 2, p. 123.)

§ 316. Same—Payment of Special Taxes.

§ *12, Act Mch. 3, 1917, c. 165.* "That the payment of the special tax required of wholesale or retail liquor dealers by the United States by any person or persons other than manufacturers or druggists licensed under section five of this Act, within the District of Columbia, shall be *prima facie* evidence that such person or persons are engaged in keeping and selling, offering and exposing for sale alcoholic liquors contrary to the provisions of this Act, and a certificate from the collector of internal revenue, his agents, clerks, or deputies showing the payment of such tax, and the name or names of person to whom issued, and the names of the person or persons, if any, associated with the person to whom such tax receipt is issued, shall be sufficient evidence of the payment of such tax and of the association of such persons for the selling and keeping, offering and exposing for sale of liquors contrary to the provisions of this Act in all trials or legal inquiries." (U. S. Comp. Stats., § 3369jj, Adv. Sheets, 239 Fed. No. 2, p. 124.)

CHAPTER 12.

WITNESSES.

SEC.

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§ 330. Competence of Witnesses Determined by State Laws.

§ *858, Rev. Stats.* "The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held." (Fed. Stats. Ann., 2d ed., title "Witnesses"; 3 U. S. Comp. Stats. 1916, § 1464.)

The phrase "civil actions" includes all judicial controversies in which the rights of property are involved whether between private parties or such parties and the government.[1] An objection to the competency of a witness is waived, where such objection was not made at the time the witness was sworn nor at any time during trial.[2]

§ 331. Competency of Witnesses in Prosecutions Under Alaska Prohibition Laws.

Part § 16, Act Feb. 14, 1917, c. ——. " . . . in all cases the members, shareholders, associates or employees in any club or association mentioned in this section shall be competent witnesses to prove any violations of the provisions of this section of this Act, or of any fact tending thereto; and no person shall be excused from testifying as to any offense committed by another against any of the provisions of this Act by reason of his testimony tending to criminate himself, but the testimony given by such person shall in no case be used against him. . . . " (Pamphlet Supp., Fed. Stats. Ann., Nos. 9–10, p. 6, title "Alaska.")

§ 332. Perjury not Now a Disqualification. § *125 of the Crim. Code, Fed. Stats. Ann., 2d ed., title "Penal Laws," 10 U. S. Comp. Stats. 1916, § 10,295,* supersedes § 5392, Rev. Stats., making perjury of a witness a disqualification. The new provision omits to make such a witness incompetent. So, also, subornation of perjury would not disqualify a witness under § *126 of the Crim. Code.* (Fed. Stats. Ann., 2d ed., title "Penal Laws"; 10 U. S. Comp. Stats. 1916, § 10,296.)

1 Green v. United States, 9 Wall. (U. S.) 655, 19 L. Ed. 806; United States v. Ten Thousand Cigars, Woolw. 123, Fed. Cas. 16,451.

2 Bise v. United States, 144 Fed. 374, 7 Ann. Cas. 165, 74 C. C. A. 1.

§ 333. Not Disqualified by Claiming Compensation Under Customs Revenue Laws.

§ 8, *Act June 22, 1874, c. 391.* "That no officer, or other person entitled to or claiming compensation under any provision of this act, shall be thereby disqualified from becoming a witness in any action, suit, or proceeding for the recovery, mitigation, or remission thereof, but shall be subject to examination and cross-examination in like manner with other witnesses, without being thereby deprived of any right, title, share, or interest in any fine, penalty, or forfeiture to which such examination may relate; and in every such case the defendant or defendants may appear and testify and be examined and cross-examined in like manner." (3 Fed. Stats. Ann., 2d ed., p. 225; 8 U. S. Comp. Stats. 1916, § 5802.)

§ 334. Officers and Informers not Disqualified in Suits for Fines, Penalties or Forfeitures.

§ 5295, *Rev. Stats.* "Any officer or other person entitled to or interested in a part or share of any fine, penalty, or forfeiture incurred under any law of the United States, may be examined as a witness in any of the proceedings for the recovery of such fine, penalty, or forfeiture by either of the parties thereto, and such examination shall not deprive such witness of his share or interest in such fine, penalty, or forfeiture." (3 Fed. Stats. Ann., 2d ed., p. 338; 10 U. S. Comp. Stats. 1916, § 10,137.)

§ 335. Immunity of Witnesses in Cases Under Commerce and Anti-trust Laws.

Act June 30, 1906, c. 3920. Extends "only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath." (34 Stats. 798; Fed. Stats. Ann., 2d ed., title "Witnesses"; 6 U. S. Comp. Stats. 1916, § 8580.)

§ 336. Immunity in Criminal Cases.

Part 5th Amend. U. S. Const. "No person . . . shall be compelled in any criminal case to be a witness against himself." (11 U. S. Comp. Stats., 1916, p. 14,320.)

The seizure or compulsory production of a man's private papers to be used against him is equivalent to compelling him to be a *witness against* himself.[3]

In Prosecutions Under Prohibition Laws District of Columbia.

Part § 7, Act March 3, 1917, c. 165. "And no person shall be excused from testifying as to any offense committed by another against any of the provisions of this Act by reason of his testimony tending to criminate himself, but the testimony given by such person shall in no case be used against him." (U. S. Comp. Stats., § 3369h, Adv. Sheets, 239 Fed. No. 2, p. 122.)

§ 337. Same—Testimony Given Before Congress.

§ 859, Rev. Stats. "No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege." (3 Fed. Stats. Ann., 2d ed., p. 166; 3 U. S. Comp. Stats. 1916, § 1467.)

§ 338. Defendant as Witness in Criminal Proceedings.

Act March 16, 1878, c. 37. "That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." (20 Stats. 30; Fed. Stats. Ann., 2d ed., title "Witnesses"; 3 U. S. Comp. Stats. 1916, § 1465.)

§ 339. Compulsory Process for Witnesses in Criminal Cases.

Part Sixth Amend. U. S. Const. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted

[3] Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. 524; In re Kanter, 117 Fed. 356.

with the witnesses against him; to have compulsory process for obtaining witnesses in his favor." (11 U. S. Comp. Stats. 1916, p. 14,388.)

§ 340. Recognizance of Witnesses—Criminal Cases.

§ *879, Rev. Stats.* "Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offense against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case. And where the crime or offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the United States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused, whose testimony in his opinion is important, and is in danger of being otherwise lost." (Fed. Stats. Ann., 2d ed., title "Witnesses"; 3 U. S. Comp. Stats. 1916, § 1490.)

§ 341. Same—In Vermont.

§ *880, Rev. Stats.* "In the district of Vermont, all recognizances of witnesses taken by any magistrate in said district, for their appearance to testify in any case cognizable either in the district or circuit court thereof, shall be to the circuit court next thereafter to be held in the said district." (Fed. Stats. Ann., 2d ed., title "Witnesses"; 3 U. S. Comp. Stats. 1916, § 1491.)

§ 342. Same—On Behalf of the United States by District Attorney.

§ *881, Rev. Stats.* "Any judge of the United States, on the application of a district attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance, with or without sureties, at his discretion, to appear to testify therein; and, for that purpose, may issue a warrant against such person, under his

hand, with or without seal, directed to the marshal or other officer authorized to execute process in behalf of the United States, to arrest and bring before him such person. If the person so arrested neglects or refuses to give recognizance in the manner required, the judge may issue a warrant of commitment against him, and the officer shall convey him to the prison mentioned therein. And the said person shall remain in confinement until he is removed to the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge." (Fed. Stats. Ann., 2d ed., title "Witnesses"; 3 U. S. Comp. Stats. 1916, § 1492.)

§ 343. Subpoena for Witnesses in Another District.

§ *876, Rev. Stats.* "Subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district: *Provided,* That in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same." (Fed. Stats. Ann., 2d ed., title "Witnesses"; 3 U. S. Comp. Stats. 1916, § 1487.)

In civil actions if a witness lives out of the district at a greater distance than one hundred miles from the place of holding court, his testimony must be taken by deposition.[4]

In criminal cases there seems to be no limit.[5]

§ 344. Subpoena and Attendance of Witnesses for United States.

§ *877, Rev. Stats.* "Witnesses who are required to attend any term of a [circuit or] district court on the part of the United States shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney." (Fed. Stats. Ann., 2d ed., title "Witnesses"; 3 U. S. Comp. Stats. 1916, § 1488.)

4 Smith v. Chicago etc. R. Co., 38 Fed. 321.
5 United States v. Potter, Boyce U. S. Pr. 98, 27 Fed. Cas. No. 16,075.

§ 345. Subpoena for Witnesses for Indigent Defendant in Criminal Cases.

§ *878, Rev. Stats.* "Whenever any person indicted in a court of the United States makes affidavit, setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the court in term, or any judge thereof in vacation, may order that such witnesses be subpoenaed if found within the limits aforesaid. In such case the costs incurred by the process and the fees of the witness shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpoenaed in behalf of the United States." (Fed. Stats. Ann., 2d ed., title "Witnesses"; 3 U. S. Comp. Stats. 1916, § 1489.)

§ 346. Enforcing Attendance and Testimony of Witnesses.

§ *4073, Rev. Stats.* "If any person shall refuse or neglect to appear at the time and place mentioned in the summons issued, in accordance with section forty hundred and seventy-one, or if upon his appearance he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit in the district court of the United States." (3 Fed. Stats. Ann., 2d ed., p. 223; 7 U. S. Comp. Stats. 1916, § 7621.)

§ 347. Court's Power to Punish Witnesses for Contempt.

§ *268, Jud. Code (Re-enacting § 725, Rev. Stats.).* "The said courts shall have power . . . to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: . . . the disobedience or resistance . . . by any . . . witness . . . to any lawful writ, process, order, rule, decree, or command of said courts." (36 Stats. 1163; 5 Fed. Stats. Ann., 2d ed., p. 1009; 2 U. S. Comp. Stats. 1916, § 1245.)

§ 348. Fees and Mileage of Witnesses Who Testify on Letters Rogatory.

§ *4074, Rev. Stats.* "Every witness who shall so appear and testify shall be allowed, and shall receive from the party

at whose instance he shall have been summoned, the same fees and mileage as are allowed to witnesses in suits depending in the district courts of the United States." (Fed. Stats. Ann., 2d ed., title "Witnesses"; 7 U. S. Comp. Stats. 1916, § 7622.)

§ 349. Amount of Fees and Mileage of Witnesses.

§ *848, Rev. Stats.* "For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. When a witness is subpoenaed in more than one cause between the same parties, at the same court, only one travel fee and one *per diem* compensation shall be allowed for attendance. Both shall be taxed in the case first disposed of, after which the *per diem* attendance fee alone shall be taxed in the other cases in the order in which they are disposed of.

"When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of one dollar a day." (Fed. Stats. Ann., 2d ed., title "Witnesses"; 2 U. S. Comp. Stats. 1916, § 1452.)

§ 350. Fees and Mileage in Certain States—Double Mileage Prohibited.

§ *1, Act May 27, 1908, c. 200.* "Jurors and witnesses in the United States courts in the States of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado, and Utah, and in the Territories of New Mexico and Arizona shall be entitled to receive for actual attendance at any court or courts and for the time necessarily occupied in going to and returning from the same, three dollars a day, and fifteen cents for each mile necessarily traveled over any stage line, or by private conveyance, and five cents for each mile by any railway or steamship in going to and returning from said courts: *Provided,* That no constructive or double mileage fees shall be allowed by reason of any person being summoned as both a witness and juror, or as a witness in two or more cases pending in the same court and triable at the same term thereof." (35 Stats. 377; Fed. Stats. Ann., 2d ed., title "Witnesses"; 2 U. S. Comp. Stats. 1916, § 1453, p. 2339.)

§ 351. Subpoena for Witnesses in Contested Patent Cases.

§ *4906, Rev. Stats.* "The clerk of any court of the United States, for any district or territory wherein testimony is to be taken for use in any contested case pending in the Patent Office, shall, upon the application of any party thereto, or of his agent or attorney, issue a subpoena for any witness residing or being within such district or territory, commanding him to appear and testify before any officer in such district or territory authorized to take depositions and affidavits, at any time and place in the subpoena stated. But no witness shall be required to attend at any place more than forty miles from the place where the subpoena is served upon him." (Fed. Stats. Ann., 2d ed., title "Witnesses"; 8 U. S. Comp. Stats. 1916, § 9451.)

§ 352. Enforcing Attendance and Testimony of Witnesses in Patent Cases.

§ *4908, Rev. Stats.* "Whenever any witness, after being duly served with such subpoena, neglects or refuses to appear, or after appearing refuses to testify, the judge of the court whose clerk issued the subpoena may, on proof of such neglect or refusal, enforce obedience to the process, or punish the disobedience, as in other like cases. But no witness shall be deemed guilty of contempt for disobeying such subpoena, unless his fees and traveling expenses in going to, returning from, and one day's attendance at the place of the examination, are paid or tendered him at the time of the service of the subpoena; nor for refusing to disclose any secret invention or discovery made or owned by himself." (Fed. Stats. Ann., 2d ed., title "Witnesses"; 8 U. S. Comp. Stats. 1916, § 9453.)

§ 353. Fees of Witnesses in Patent Cases.

§ *4907, Rev. Stats.* "Every witness duly subpoenaed and in attendance shall be allowed the same fees as are allowed to witnesses attending the courts of the United States." (Fed. Stats. Ann., 2d ed., title "Witnesses"; 8 U. S. Comp. Stats. 1916, § 9452.)

§ 354. Subpoena to Witnesses in Claim Cases Against United States Pending in Departments.

§ *184, Rev. Stats.* "Any head of a department or bureau in which a claim against the United States is properly pending may apply to any judge or clerk of any court of the United States, in any state, district, or territory, to issue a subpoena for a witness being within the jurisdiction of such court, to appear at a time and place in the subpoena stated, before any officer authorized to take depositions to be used in the courts of the United States, there to give full and true answers to such written interrogatories and cross-interrogatories as may be submitted with the application, or to be orally examined and cross-examined upon the subject of such claim." (2 Fed. Stats. Ann., 2d ed., p. 175; 1 U. S. Comp. Stats. 1916, § 266.)

§ 355. Enforcing Attendance and Testimony of Witnesses in Claim Cases Against United States Pending in Departments.

§ *186, Rev. Stats.* "If any witness, after being duly served with such subpoena, neglects or refuses to appear, or, appearing, refuses to testify, the judge of the district in which the subpoena issued may proceed, upon proper process, to enforce obedience to the subpoena, or to punish the disobedience in like manner as any court of the United States may do in case of process of subpoena *ad testificandum* issued by such court." (2 Fed. Stats. Ann., 2d ed., p. 176; 1 U. S. Comp. Stats. 1916, § 268.)

§ 356. Fees of Witnesses in Claim Cases Against United States Pending in Departments.

§ *185, Rev. Stats.* "Witnesses subpoenaed pursuant to the preceding section shall be allowed the same compensation as is allowed witnesses in the courts of the United States." (2 Fed. Stats. Ann., 2d ed., p. 175; 1 U. S. Comp. Stats. 1916, § 267.)

§ 357. Compulsory Attendance of Witnesses Under Interstate Commerce Act.

Part § 3, Act Feb. 19, 1903, c. 708. "And in proceedings under this act and the acts to regulate commerce, the said

courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in such proceeding." (32 Stats. 848; 4 Fed. Stats. Ann., 2d ed., p. 566; 8 U. S. Comp. Stats. 1916, § 8599.)

§ 358. Compulsory Attendance of Witnesses Under Income Tax Law.

§ *20, Act Sept. 8, 1916, c. 463.* "That jurisdiction is hereby conferred upon the district courts of the United States for the district within which any person summoned under this title to appear to testify or to produce books shall reside, to compel such attendance, production of books, and testimony by appropriate process." (Pamphlet Supp., Fed. Stats. Ann., 2d ed., title Internal Revenue, No. 8, p. 97; 6 U. S. Comp. Stats. 1916, § 63,365, p. 7359.)

§ 359. Administration of Oaths.

§ *266, Jud. Code* (*see* § 347, *supra*). "The said courts shall have power to impose and administer all necessary oaths. . . ."

§ *183, Rev. Stats., as Amended by Act Feb. 13, 1911, c. 43.* "Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army, Navy, Marine Corps, or Revenue-cutter Service detailed to conduct an investigation, and the recorder, and if there be none the presiding officer, of any military, naval, or revenue-cutter service board appointed for such purpose, shall have authority to administer an oath to any witness attending to

testify or depose in the course of such investigation." (36 Stats. 898; Fed. Stats. Ann., 2d ed., title "Public Officers"; 1 U. S. Comp. Stats. 1916, § 265, p. 114.)

Part § 12, Act Sept. 24, 1917, c. ——. (i) "The comptroller and the auditor, and such persons as may be authorized in writing by either of them, may administer oaths to American citizens in respect to any matter within the jurisdiction of either of said officers and certify the official character, when known, of any foreign officer whose jurat or certificate may be necessary on any paper to be filed with them." (Adv. Sheets, 244 Fed. No. 3, p. 323; U. S. Comp. Stats. 1916, § 420a.)

Act March 4, 1917, c. 179. "That hereafter, in the performance of the duties required of the Department of Agriculture by the provisions of this Act relating to the Bureau of Markets, the Secretary of Agriculture shall have power to administer oaths, examine witnesses, and call for the production of books and papers." (U. S. Comp. Stats. 1916, § 795a; Adv. Sheets, 239 Fed. No. 3, p. 146.)

Act Jan. 25, 1895, c. 45, as Amended, Act March 3, 1901, c. 834, and Act March 4, 1917, c. 180. "That judges advocate of naval general courts-martial and courts of inquiry, and all commanders in chief of naval squadrons, commandants of navy yards and stations, officers commanding vessels of the Navy, and recruiting officers of the Navy, and the adjutant and inspector, assistants adjutant and inspector, commanding officers, recruiting officers of the Marine Corps, and such other officers of the Regular Navy and Marine Corps, of the Naval Reserve Force, of the Marine Corps Reserve, and of the National Naval Volunteers as may be hereafter designated by the Secretary of the Navy, be, and they are hereby, authorized to administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration." (U. S. Comp. Stats. 1916, § 3037; Adv. Sheets, 239 Fed. No. 3, p. 154.)

Part § 17, Act Feb. 4, 1887, as Amended by § 2, Act Aug. 9, 1917, c. ——. "That . . . Any member of the (Interstate Commerce) commission may administer oaths and affirmations and sign subpoenas."

Act Oct. 6, 1917, c. ——. "[Affidavits—before whom taken —persons in military or naval service.] That during the continuance of the present war with Germany, and until his dis-

charge from service, any man serving in the armed forces of the United States, who, prior to the beginning of his services was a settler, an applicant, or entryman under the land laws of the United States, or who has, prior to enlistment, filed a contest, with the view of exercising preference right of entry therefor, may make any affidavit required by law or regulation of the department, affecting such application, entry, or contest, or necessary to the making of entry in the case of the successful termination of such contest awarding him preference right of entry, before his commanding officer as provided in section twenty-two hundred and ninety-three of the Revised Statutes of the United States, which affidavits shall be as binding in law and with like penalties as if taken before the Register of the United States Land Office." (Pamphlet Supp., Fed. Stats. Ann. No. 12, p. 110, title "Public Lands.")

§ 360. Discovery Under Act for National Security and Defense Stimulating Agriculture.

Act Aug. 10, 1917, c. ——. § 2. [Authority of Secretary of Agriculture—investigation relative to production, etc., of food.] "That the Secretary of Agriculture, with the approval of the President, is authorized to investigate and ascertain the demand for, the supply, consumption, costs, and prices of, and the basic facts relating to the ownership, production, transportation, manufacture, storage, and distribution of, foods, food materials, feeds, seeds, fertilizers, agricultural implements and machinery, and any article required in connection with the production, distribution, or utilization of food. It shall be the duty of any person, when requested by the Secretary of Agriculture, or any agent acting under his instructions, to answer correctly, to the best of his knowledge, under oath or otherwise, all questions touching his knowledge of any matter authorized to be investigated under this section, or to produce all books, letters, papers, or documents in his possession, or under his control, relating to such matter. Any person who shall, within a reasonable time to be prescribed by the Secretary of Agriculture, not exceeding thirty days from the date of the receipt of the request, willfully fail or refuse to answer such questions or to produce such books, letters, papers, or documents, or who shall willfully give any answer that is false or misleading, shall be guilty of a misdemeanor, and upon

conviction thereof, shall be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both." (Pamphlet Supp., Fed. Stats. Ann. No. 12, p. 2, title "Agriculture.")

§ 361. Compelling Attendance of Witnesses, etc., Under Act Establishing Bureau of War Risk Insurance.

Act Oct. 6, 1917, c. ——. "§ 15. That for the purposes of this Act, the director, commissioners, and deputy commissioners shall have power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles, to require the production of books, papers, documents, and other evidence, to administer oaths and to examine witnesses upon any matter within the jurisdiction of the bureau. The director may obtain such information and such reports from officials and employees of the departments of the Government of the United States and of the States as may be agreed upon by the heads of the respective departments. In case of disobedience to a subpoena, the bureau may invoke the aid of any district court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court, within the jurisdiction of which the inquiry is carried on, may, in case of contumacy or refusal to obey a subpoena issued to any officer, agent, or employee of any corporation or other person, issue an order requiring such corporation or other person to appear before the bureau, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. Any person so required to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States." (Pamphlet Supp., Fed. Stats. Ann. No. 12, p. 152, title "War Dept., etc.)

CHAPTER 13.

DEPOSITIONS.

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§ 370. In General. Depositions in law actions can only be taken on grounds specified in the federal statutes, and in equity "when allowed by statute or for good and exceptional cause for

departing from the general rule." (Equity Rule 47, §§ 373, 374, *post.*)

The federal statutes authorize two classes of depositions: (1) On notice, *de bene esse,* that is to say, provisionally anticipating that it will be impossible to produce the witness in open court for the reasons specified in § 863, Rev. Stats. (§ 375 et seq., *post*); (2) on commission under § 866, Rev. Stats. (§ 384, *post*).

The manner of taking these depositions is specified for *de bene esse* in §§ 863–865, Rev. Stats. (§ 376 et seq., *post*), and on commission in §§ 866, 868, 869, 870, Rev. Stats. (§ 384 et seq., *post*); the latter kind of depositions not being affected by §§ 863–865, Rev. Stats. Depositions may also be taken under act March 9, 1892, chapter 14 (§ 389, *post*) in the mode, though not on the grounds, prescribed by the laws of the state, and under § 867, Rev. Stats. (§ 388, *post*), a federal court in its discretion may admit in evidence in any cause before it any deposition taken *in perpetuam rei memoriam*, under state law.

Depositions in equity may also be taken under order of court (§ 374 et seq., *post*).

Letters rogatory or on commission are used to obtain testimony of witnesses in foreign countries (§ 393, *post*).

Depositions may be taken to be used in foreign countries under §§ 4071, 4072, Rev. Stats. (§ 394 et seq., *post*).

§ 371. Time for Taking Depositions at Law. At law, the statute does not designate the time for taking depositions. In providing for special notice whenever by reason of want of an attorney of record the giving of notice as therein required shall be impracticable, possibly the statute implies that such depositions may be taken before issue joined.

§ 372. Time for Taking Depositions in Equity.

Equity Rule 54. "After a cause is at issue, depositions may be taken as provided by §§ 863, 865, 866, and 867, Revised Statutes. But if in any case no notice has been given the opposite party of the time and place of taking the deposition,

he shall, upon application and notice, be entitled to have the witness examined orally before the court or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge under all the circumstances shall order." (3 U. S. Comp. Stats. 1916, § 1536, p. 2519; Simkins' Federal Equity Suit, 3d ed., pp. 492, 497, 514, 539.)

It will be noted from the above, that depositions taken in equity suits *de bene esse* or on commission under the federal statutes are only so taken after the cause is at issue. If necessity exists for taking depositions before cause is at issue, such depositions should be taken under Rule 47 (§ 374, below) on affidavit showing good and exceptional cause for departing from the general rule and an order of court specifying the notice and terms for taking.

Time for taking depositions in equity after issue is set out in the following section:

§ 373. Same—Depositions in Equity After Issue.

Last Part Equity Rule 47. " . . . All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires." (3 U. S. Comp. Stats. 1916, § 1536, p. 2516; Foster's Federal Practice, 5th ed., p. 1131, § 352.)

§ 374. Grounds for Depositions in Equity: When Allowed by Statute, or for Good and Exceptional Cause.

First Part Equity Rule 47. "The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer,

upon the notice and terms specified in the order. . . . " (3 U. S. Comp. Stats. 1916, § 1536, p. 2516; Foster's Federal Practice, 5th ed., p. 1131, § 352.)

§ 375. Depositions De Bene Esse—Conditions for Taking and Using.

Part § 863, Rev. Stats. "The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse,* when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. . . . " (3 Fed. Stats. Ann., 2d ed., p. 172; 3 U. S. Comp. Stats. 1916, § 1472.)

Last Part § 865, Rev. Stats. " . . . But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause." (3 Fed. Stats. Ann., 2d ed., p. 185; 3 U. S. Comp. Stats. 1916, § 1474.)

§ 376. Officers Before Whom Depositions De Bene Esse may be Taken.

Part § 863, Rev. Stats. " . . . The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. . . . " (3 Fed. Stats. Ann., 2d ed., p. 172; 3 U. S. Comp. Stats. 1916, § 1472.)

Notaries may Take Depositions.

Act Aug. 15, 1876, c. 304. "That notaries public of the several states, territories, and the District of Columbia be and they

are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioner of the United States circuit court may now lawfully take or do." (19 Stats. 206; 6 Fed. Stats. Ann., 2d ed., p. 1245; 3 U. S. Comp. Stats. 1916, § 1475.)

§ 377. Notice of Taking Depositions De Bene Esse.

Part § 863, Rev. Stats. " . . . Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct." (3 Fed. Stats. Ann., 2d ed., p. 172; 3 U. S. Comp. Stats. 1916, § 1472.)

FORM OF NOTICE.

In the District Court of the United States in and for the —— District of ——, —— Division.

John Doe,
Plaintiff,
v.
Richard Roe,
Defendant.

NOTICE OF TAKING DEPOSITIONS.

To Henry Smith, Defendant [or plaintiff] or John Jones, His Attorney.

Please take notice that on (Monday) the —— day of ——, 1918, at —— o'clock —— M. the deposition *de bene esse* of Charles Black, of the city of ——, county of ——, and state of ——, will be taken on behalf of the plaintiff [or defendant] herein, before Frank Monroe, who is a commissioner of the district court of the United States for —— district of —— [or a notary public in and for the county of ——, state of ——, or other officer specified

in section 863, Rev. Stats.] who is not of counsel or attorney to either of the parties, nor interested in the event of the cause, at his office, No. ——, in the city of ——, county of ——, state of ——.

The said witness resides at ——, more than one hundred miles from the place where the trial of this action will occur [or is bound on a voyage to sea, or about to go out of the United States, or out of the district where the case is to be tried, and to a greater distance, than one hundred miles from the place of trial, or is ancient or infirm].

The examination of said witness will proceed from day to day until completed and will be taken under sections 863, 864, 865, Revised Statutes of the United States.

Dated, ——.

——, Attorney for Plaintiff [or Defendant].

§ 378. Compelling Attendance of Witness — Depositions De Bene Esse.

Part § 863, Rev. Stats. "Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court." (3 Fed. Stats. Ann., 2d ed., p. 172; 3 U. S. Comp. Stats. 1916, § 1472.)

§ 379. Mode of Taking Depositions De Bene Esse.

§ *864, Rev. Stats.* "Every person deposing as provided in the preceding section shall be cautioned and sworn to testify the whole truth, and carefully examined. His testimony shall be reduced to writing or typewriting by the officer taking the deposition, or by some person under his personal supervision, or by the deponent himself in the officer's presence, and by no other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the deponent. (3 Fed. Stats. Ann., 2d ed., p. 184; 3 U. S. Comp. Stats. 1916, § 1473.)

FORM OF DEPOSITION.

In the District Court of the United States in and for the —— District of ——,
—— Division.

John Doe,
Plaintiff,
v.
Richard Roe,
Defendant.

DEPOSITION OF ——,

Taken on Behalf of Defendant [or Plaintiff].

State of ——,
County of ——,
District of ——,
—— Division,
ss.

—— of the city of ——, county of —— and state of ——, residing more than one hundred miles from the place where the trial of this action will occur [as being bound on a voyage to sea, or about to go out of the United States, or out of the district where the case is to be tried, and to a greater distance than one hundred miles from the place of trial, or being ancient or infirm] a witness called on behalf of the plaintiff [or defendant] herein, being duly cautioned and sworn to testify the whole truth, and being carefully examined, deposes and says as follows:

——, Esquire, appeared as attorney for plaintiff and ——, Esquire, appeared as attorney for defendant. [The testimony on request of either party should be by question and answer otherwise in narrative form.]

Q. 1. State your name and age.

A.

Q. 2. State your residence.

FORM OF OFFICER'S CONCLUDING CERTIFICATE.

In the District Court of the United States in and for the —— District of ——,
—— Division.

John Doe,
Plaintiff,
v.
Richard Roe,
Defendant.

State of ——,
County of ——,
District of ——,
—— Division,
ss.

I hereby certify that on the —— day of ——, ——, before me, —— ——, a commissioner of the United States for the —— district of —— [or other

official designation], at my office, No. ——, in the city of ——, county of ——, state of ——, personally appeared, pursuant to the notice hereto annexed, between the hours of —— o'clock —— M. and —— o'clock —— M., ——, the witness named in said notice, and ——, Esquire, appearing for plaintiff, and ——, Esquire, appearing for defendant, and the said —— being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as in the foregoing annexed deposition set out.

I further certify that said deposition was begun on the —— day of ——, ——, and continued from day to day until the —— day of ——, ——, when same was completed.

I further certify that the several exhibits attached to said deposition, were offered in evidence and marked for identification as is set out in said deposition.

I further certify that the said deposition was then and there reduced to writing [or typewriting] by me [or under my personal supervision, or by the witness in my presence], and was, after it had been reduced to writing [or typewriting], subscribed by the witness, and the same has been retained by me for the purpose of sealing up and directing the same to the clerk of the court as required by law.

I further certify that the reason why the said deposition was taken was that the said witness resides at ——, more than one hundred miles from —— the place where this cause is to be tried [or other reason, specified section 863, Revised Statutes].

I further certify that I am not of counsel or attorney to either of the parties, nor am I interested in the event of the cause.

I further certify that the fee for taking said deposition, $——, has been paid to me by the plaintiff [or defendant], and the same is just and reasonable.

Witness my hand and official seal at ——, this —— day of ——, ——.
[Seal]
——,
[Title.]

§ 380. Equity Rule as to Form of Deposition.

Equity Rule 49. "All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court. Depositions, whether upon oral examination before an examiner or like officer or otherwise, shall be taken upon questions and answers reduced to writing, or in the form of narrative, and the witnesses shall be subject to cross and re-examination." (3 U. S. Comp. Stats. 1916, § 1536, p. 2518; Foster's Federal Practice, 5th ed., p. 1132, § 352; Simkins' Federal Equity Suit, 3d ed., pp. 501, 531, 533.)

§ 381. Equity Rule as to Objections to Evidence.

Part Equity Rule 51. "Objections to the evidence, before an examiner or like officer, shall be in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate. . . . Objection to any question or questions shall be noted by the officer upon the depositions, but he shall not have power to decide on the competency or materiality or relevancy of the questions. The court shall have power, and it shall be its duty, to deal with the costs of incompetent and immaterial or irrelevant depositions, or parts of them, as may be just." (3 U. S. Comp. Stats. 1916, § 1536, p. 2518; Foster's Federal Practice, 5th ed., p. 1132, § 352; Simkins' Federal Equity Suit, 3d ed., p. 526.)

§ 382. Equity Rule as to Signing Deposition.

Part Equity Rule 51. " . . . The testimony of each witness, after being reduced to writing, shall be read over to or by him, and shall be signed by him in the presence of the officer: *Provided,* That if the witness shall refuse to sign his deposition so taken, the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. . . . " (3 U. S. Comp. Stats. 1916, § 1536, p. 2518; Foster's Federal Practice, 5th ed., p. 1132, § 352; Simkins' Federal Equity Suit, 3d ed., pp. 502, 531, 533.)

§ 383. Delivery into Court of Depositions De Bene Esse.

Part § 865, Rev. Stats. "Every deposition taken under the two preceding sections (863–4, R. S.) shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. . . . " (3 Fed. Stats. Ann., 2d ed., p. 185; 3 U. S. Comp. Stats. 1916, § 1474.)

§ 384. Depositions Under a Commission.

§ *866, Rev. Stats.* "(Depositions under a *dedimus potestatem* and *in perpetuam,* etc.) In any case where it is necessary, in order to prevent a failure or delay of justice, any of

the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken *in perpetuam rei memoriam,* if they relate to any matters that may be cognizable in any court of the United States. And the provisions of sections eight hundred and sixty-three, eight hundred and sixty-four, and eight hundred and sixty-five, shall not apply to any deposition to be taken under the authority of this section." (3 Fed. Stats. Ann., 2d ed., p. 189; 3 U. S. Comp. Stats. 1916, § 1477.)

§ 385. Witnesses Exempt from Attendance—Depositions Under a Commission.

§ *870, Rev. Stats.* "No witness shall be required, under the provisions of either of the two preceding sections (§§ 868, 869, R. S.), to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor shall any witness be deemed guilty of contempt for disobeying any subpoena directed to him by virtue of the said sections, unless his fee for going to, returning from, and one day's attendance at the place of examination, are paid or tendered to him at the time of the service of the subpoena." (3 Fed. Stats. Ann., 2d ed., p. 195; 3 U. S. Comp. Stats. 1916, § 1481.)

§ 386. Compelling Attendance and Testimony of Witnesses for Depositions Under Commission.

§ *868, Rev. Stats.* "When a commission is issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or territory, the clerk of any court of the United States for such district or territory shall, on the application of either party to the suit, or of his agent, issue a subpoena for such witness, commanding him to appear and testify before the commissioner named in the commission, at a time and place stated in the subpoena; and if any witness, after being duly served with such subpoena, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the

satisfaction of any judge of the court whose clerk issues such subpoena, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpoena to testify issued by such court." (3 Fed. Stats. Ann., 2d ed., p. 193; 3 U. S. Comp. Stats. 1916, § 1479.)

§ 387. Compelling Production of Papers, Written Instruments, Books or Documents in Taking Depositions Under a Commission.

§ *869, Rev. Stats.* "(*Subpoena duces tecum* under a *dedimus potestatem.*) When either party in such suit applies to any judge of a United States court in such district or territory for a subpoena commanding the witness, therein to be named, to appear and testify before said commissioner, at the time and place to be stated in the subpoena, and to bring with him and produce to such commissioner any paper or writing or written instrument or book or other document, supposed to be in the possession or power of such witness, and to be described in the subpoena, such judge, on being satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpoena accordingly. And if the witness, after being served with such subpoena, fails to produce to the commissioner at the time and place stated in the subpoena, any such paper, writing, written instrument, book, or other document, being in his possession or power, and described in the subpoena, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpoena, or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book, or other document is produced to such commissioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties." (3 Fed. Stats. Ann., 2d ed., p. 194; 3 U. S. Comp. Stats. 1916, § 1480.)

§ 388. Depositions to Perpetuate Testimony Under State Laws—Admissible in Court's Discretion.

§ *867, Rev. Stats.* "Any court of the United States may, in its discretion, admit in evidence in any cause before it any deposition taken *in perpetuam rei memoriam,* which would be so admissible in a court of the state wherein such cause is pending, according to the laws thereof." (3 Fed. Stats. Ann., 2d ed., p. 192; 3 U. S. Comp. Stats. 1916, § 1478.)

§ 389. Depositions may be Taken in Mode Prescribed by State Law.

Act March 9, 1892, c. 14. "That in addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the law of the state in which the courts are held." (3 Fed. Stats. Ann., 2d ed., p. 225; 3 U. S. Comp. Stats. 1916, § 1476.)

§ 390. Depositions in Equity Under Court Order Before Commissioner, Master or Examiner.

Equity Rule 52. "Witnesses who live within the district, and whose testimony may be taken out of court by these rules, may be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court.

"In case of refusal of witnesses to attend or be sworn or to answer any question put by the commissioner, master or examiner or by counsel or solicitor, the same practice shall be

adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories." (3 U. S. Comp. Stats. 1916, § 1536, p. 2519; Foster's Federal Practice, 5th ed., p. 1100, § 340, p. 1104, § 341, p. 1133, § 351; Simkins' Federal Equity Suit, 3d ed., pp. 293, 493, 494, 495, 523, 525.)

§ 391. Same—Notice.

Equity Rule 53. "Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer may fix by order in each case." (3 U. S. Comp. Stats. 1916, § 1536, p. 2519; Foster's Federal Practice, 5th ed., p. 1133, § 352; Simkins' Federal Equity Suit, 3d ed., pp. 500, 522.)

§ 392. Deposition in Equity Published on Filing.

Equity Rule 55. "Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published, unless otherwise ordered by the court." (3 U. S. Comp. Stats. 1916, § 1536, p. 2520; Foster's Federal Practice, 5th ed., p. 1133, § 352; Simkins' Federal Equity Suit, 3d ed., p. 534.)

§ 393. Letters Rogatory or Commissions to Take Depositions of Witnesses in Foreign Countries.

§ *875, Rev. Stats.* "When any commission or letter rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have an interest, is executed by the court or the commissioner to whom it is directed, it shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where it is executed. On receiving the same, the said minister or consul shall indorse thereon a certificate, stating when and where the same was received, and that the said deposition is in the same condition as when he received it; and he shall thereupon transmit the said letter or commission, so executed and certified, by mail, to the clerk of the court from which the same issued, in the manner in which his official dispatches are transmitted to the government. And the

testimony of witnesses so taken and returned shall be read as evidence on the trial of the suit in which it was taken, without objection as to the method of returning the same. When letters rogatory are addressed from any court of a foreign country to any circuit court of the United States, a commissioner of such circuit court designated by said court to make an examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts." (3 Fed. Stats. Ann., 2d ed., p. 196; 3 U. S. Comp. Stats. 1916, § 1486.)

§ 394. Taking Testimony to be Used in Foreign Countries.

§ *4071, Rev. Stats.* "The testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony, together with specific written interrogatories, accompanying the same, and addressed to such witness, shall have been issued from the court in which such suit is pending, on producing the same before the district judge of any district where the witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. And no witness shall be compelled to appear or to testify under this section except for the purpose of answering such interrogatories so issued and accompanying such commission or letters: *Provided,* That when counsel for all the parties attend the examination, they may consent that questions in addition to those accompanying the commission or letters rogatory may be put to the witness, unless the commission or letters rogatory exclude such additional interrogatories. The summons shall specify the time and place at which the witness is required to attend, which place shall be within one hundred miles of the place where the witness resides or shall be served with such sum-

mons." (3 Fed. Stats. Ann., 2d ed., p. 222; 7 U. S. Comp. Stats. 1916, § 7619.)

§ 395. Same—Witness Need not Criminate Himself.

§ *4072, Rev. Stats.* "No witness shall be required, on such examination or any other under letters rogatory, to make any disclosure or discovery which shall tend to criminate him either under the laws of the state or territory within which such examination is had, or any other, or any foreign state." (3 Fed. Stats. Ann., 2d ed., p. 223; 7 U. S. Comp. Stats. 1916, § 7620.)

§ 396. Publicity in Taking Depositions in Anti-trust Cases.

Act March 3, 1913, c. 114. "That in the taking of depositions of witnesses for use in any suit in equity brought by the United States under the act entitled 'An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies,' approved July second, eighteen hundred and ninety, and in the hearings before any examiner or special master appointed to take testimony therein, the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable." (37 Stats. 731; 8 U. S. Comp. Stats. 1916, § 8826, p. 9665.)

CHAPTER 14.

COSTS AND FEES.

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§ 400. In General. Costs and fees of actions or suits pending or determined in the federal courts are regulated by the federal statutes.[1] On removal the costs that have accrued in the state court under state statutes will be taxable in the federal courts,[2] and the costs provided by state statutes will be taxed in the federal courts, for statutory proceedings adopted by the federal courts from the state practice.[3] Where the state statute provides that a nonresident shall give security for costs, the federal courts will enforce same in a common-law action.[4]

§ 401. Taxable Costs and Fees.

§ *823, Rev. Stats.* "The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several states, and territories, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as

1 Bradford v. Bradford, 2 Flipp. 280, Fed. Cas. No. 1766; Heckman v. Mackey, 32 Fed. 574; Carlisle v. Cooper, 64 Fed. 475, 12 C. C. A. 235.
2 Cleaver v. Traders' Ins. Co., 40 Fed. 863; Wolf v. Connecticut etc. Ins. Co., 1 Flipp. 377, Fed. Cas. No. 17,924, 1 Cent. L. J. 301; Gunther v. Liverpool etc. Ins. Co., 10 Fed. 830, 20 Blatchf. 390; National Steamship Co. v. Tugman, 67 Fed. 16.
3 Huntress v. Epsom, 15 Fed. 732; Morrison v. Bernards Tp., 35 Fed. 400; New Hampshire Land Co. v. Tilton, 29 Fed. 764.
4 Henning v. Western Union Tel. Co., 40 Fed. 658. See, also, Schofield v. Palmer, 134 Fed. 754; Winkley Co. v. Bowen Mfg. Co., 180 Fed. 624.

may be in accordance with general usage in their respective states, or may be agreed upon between the parties." (2 Fed. Stats. Ann., 2d ed., p. 624; 2 U. S. Comp. Stats. 1916, § 1375.)

§ 402. Bill of Costs.

§ *983, Rev. Stats.* "The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases whereby law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause." (2 Fed. Stats. Ann., 2d ed., p. 644; 3 U. S. Comp. Stats. 1916, § 1624; Foster's Federal Practice, 5th ed., pp. 1324, 1337.)

§ 403. Same—Must be Verified.

§ *984, Rev. Stats.* "Before any bill of costs shall be taxed by any judge or other officer, or allowed by any officer of the Treasury, in favor of clerks, marshals, commissioners, or district attorneys, the party claiming such bill shall prove by his own oath, or that of some other person having knowledge of the facts, to be attached to such bill, and filed therewith, that the services charged therein have been actually and necessarily performed, as therein stated." (2 Fed. Stats. Ann., 2d ed., p. 646; 3 U. S. Comp. Stats. 1916, § 1625; Foster's Federal Practice, 5th ed., p. 1337.)

§ 404. Costs—Indigent Parties.

§ *1, Act July 20, 1892, c. 209.* "That any citizen of the United States entitled to commence or defend any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give

security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal." (As amended Act June 25, 1910, c. 435; 2 Fed. Stats. Ann., 2d ed., p. 647; 3 U. S. Comp. Stats. 1916, § 1626.)

§ *2, Act July 20, 1892, c. 209.* "After any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and wilful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury is in other cases." (2 Fed. Stats. Ann., 2d ed., p. 650; 3 U. S. Comp. Stats. 1916, § 1627.)

§ *3, Act July 20, 1892, c. 209.* "The officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases." (2 Fed. Stats. Ann., 2d ed., p. 651; 3 U. S. Comp. Stats. 1916, § 1628.)

§ *4, Act July 20, 1892, c. 209.* "The court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious. (2 Fed. Stats. Ann., 2d ed., p. 1; 3 U. S. Comp. Stats. 1916, § 1629.)

§ *5, Act July 20, 1892, c. 209.* "Judgment may be rendered for costs at the conclusion of the suit, as in other cases: *Provided,* That the United States shall not be liable for any of the costs thus incurred." (2 Fed. Stats. Ann., 2d ed., p. 652; 3 U. S. Comp. Stats. 1916, § 1630.)

§ 405. Payment of Costs and Witness Fees for Indigent Defendant in Criminal Cases.

Part § 878, Rev. Stats. " . . . In such case the costs incurred by the process and the fees of the witnesses shall be

paid in the same manner that similar costs and fees are paid in case of witnesses subpoenaed in behalf of the United States." (Fed. Stats. Ann., 2d ed., title "Witnesses"; 3 U. S. Comp. Stats. 1916, § 1489, p. 2410; Foster's Federal Practice, 5th ed., p. 1719.)

§ 406. Costs not Allowed for Recovery Less Than Five Hundred Dollars, Where Amount in Controversy Material or Libelant Recovers Less Than Three Hundred Dollars. By § 291, Jud. Code, the powers and duties of the former circuit courts are conferred on the district courts.

§ *968, Rev. Stats.,* confers on the circuit courts authority to impose costs where recovery is less than a specified amount. As this section is not expressly repealed, it would seem that when in a district court "a plaintiff in an action at law originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the amount in dispute, exclusive of costs, exceeds said sum or value; or a libelant, upon his own appeal, recovers less than the sum or value of three hundred dollars, exclusive of costs, he shall not be allowed, but at the discretion of the court, may be adjudged to pay costs." (2 Fed. Stats. Ann., 2d ed., p. 636; 3 U. S. Comp. Stats. 1916, § 1609; Foster's Federal Practice, 5th ed., pp. 1278, 1288.)

§ 407. Costs Where Cases can be Consolidated.

§ *921, Rev. Stats.* "When causes of a like nature or relative to the same question are pending before a court of the United States, or of any territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts, for avoiding unnecessary costs or delay in the administration of justice." (3 Fed. Stats. Ann., 2d ed., title "Judiciary"; 3 U. S. Comp. Stats. 1916, § 1547; Foster's Federal Practice, 5th ed., p. 1544.)

§ *977, Rev. Stats.* "If several actions or processes are instituted, in a court of the United States or one of the Territories, against persons who might legally be joined in one

action or process touching the matter in dispute, the party pursuing the same shall not recover, on all of the judgments therein which may be rendered in his favor, the costs of more than one action or process, unless special cause for said several actions or processes is satisfactorily shown on motion in open court." (2 Fed. Stats. Ann., 2d ed., p. 643; 3 U. S. Comp. Stats. 1916, § 1618.)

§ *978, Rev. Stats.* "When proceedings are had before a court of the United States or of the Territories, on several libels against any vessel and cargo, which might legally be joined in one libel, there shall not be allowed thereon more costs than on one libel, unless special cause for libeling the vessel and cargo separately is satisfactorily shown on motion in open court. And in proceedings on several libels or informations against any cargo or parts of cargo, or merchandise seized as forfeited for the same cause, there shall not be allowed more costs than would be lawful on one libel or information, whatever may be the number of owners or consignees therein concerned. But allowance may be made on one libel or information for the costs incidental to several claims." (2 Fed. Stats. Ann., 2d ed., p. 643; 3 U. S. Comp. Stats. 1916, § 1619.)

§ 408. Mode of Recovery of Fees.

§ *857, Rev. Stats.* "The fees and compensations of the officers and persons hereinbefore mentioned, except those which are directed to be paid out of the Treasury, shall be recovered in like manner as the fees of the officers of the states respectively for like services are recovered." (4 Fed. Stats. Ann., 2d ed., p. 710; 2 U. S. Comp. Stats. 1916, § 1463.)

§ 409. Fees of Attorneys, Solicitors, Proctors.

§ *824, Rev. Stats.* "On a trial before a jury, in civil or criminal causes or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars: *Provided,* That in cases of admiralty and maritime jurisdiction, where the libelant recovers less than fifty dollars, the docket fee of his proctor shall be but ten dollars.

"In cases at law, when judgment is rendered without a jury, ten dollars.

"In cases at law, when the cause is discontinued, five dollars.

"For *scire facias,* and other proceedings on recognizances, five dollars.

"For each deposition taken and admitted in evidence in a cause, two dollars and fifty cents.

"For services rendered in cases removed from a district to a circuit court by writ of error or appeal, five dollars.

"For examination by a district attorney, before a judge or commissioner, of persons charged with crime, five dollars a day for the time necessarily employed.

"For each day of his necessary attendance in a court of the United States on the business of the United States, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the term.

"For traveling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning.

"When an indictment for crime is tried before a jury and a conviction is had, the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding thirty dollars." (4 Fed. Stats. Ann., 2d ed., p. 651; 2 U. S. Comp. Stats. 1916, § 1378; Foster's Federal Practice, 5th ed., pp. 1294, 1295.)

§ 410. Attorney's Liability for Costs Vexatiously Increased.

§ *982, Rev. Stats.* "If any attorney, proctor, or other person admitted to conduct causes in any court of the United States, or of any Territory, appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required, by order of the court, to satisfy any excess of costs so increased." (2 Fed. Stats. Ann., 2d ed., p. 644; 3 U. S. Comp. Stats. 1916, § 1623; Foster's Federal Practice, 5th ed., p. 1280.)

§ 411. Fees—Salary—United States District Attorney. By § 6, Act May 28, 1896, c. 252, 4 Fed. Stats. Ann. 2d ed., p. 718, 2 U. S. Comp. Stats. 1916, § 1418, all fees and emoluments authorized by law to be paid United States district attorneys shall be charged as heretofore, and shall be collected as far as possible and paid into the Treasury. The official himself, however, receives a salary, provided in § 7 of the act. (4 Fed. Stats. Ann., 2d ed., p. 714; 2 U. S. Comp. Stats. 1916, § 1419.)

(The District of Columbia does not seem to be included.

The following are some of the provisions: Two per cent on all moneys collected or realized in any suit or proceeding arising under the revenue laws. (§ 825, Rev. Stats.; 4 Fed. Stats. Ann., 2d ed., p. 654; 2 U. S. Comp. Stats. 1916, § 1379.)

No fees allowed on a bond left for collection, or on which suit is started, unless the party has neglected to apply for renewal for more than twenty days after maturity. (§ 826, Rev. Stats.; 4 Fed. Stats. Ann., 2d ed., p. 656; 2 U. S. Comp. Stats. 1916, § 1380.)

Fees for defense of revenue officers do not seem to be a part of taxable costs. This provision would only apply to District of Columbia. (§ 827, Rev. Stats.; 4 Fed. Stats. Ann., 2d ed., p. 656; 2 U. S. Comp. Stats. 1916, § 1381.)

Double fees would seem to be taxable in Oregon and Nevada under § 837, Rev. Stats. (4 Fed. Stats. Ann., 2d ed., p. 702; 2 U. S. Comp. Stats. 1916, § 1403.)

Where two or more indictments, suits, or proceedings should be joined, only one bill of costs allowed. (§ 980, Rev. Stats.; 4 Fed. Stats. Ann., 2d ed., p. 711; 3 U. S. Comp. Stats. 1916, § 1621.)

§ 412. Clerks' Fees.

§ *828, Rev. Stats.* "For issuing and entering every process, commission, summons, capias, execution, warrant, attachment, or other writ, except a writ of venire, or a summons or subpoena for a witness, one dollar.

"For issuing a writ of summons or subpoena, twenty-five cents.

"For filing and entering every declaration, plea, or other paper, ten cents.

"For administering an oath or affirmation, except to a juror, ten cents.

"For taking an acknowledgment, twenty-five cents.

"For taking and certifying depositions to file, twenty cents for each folio of one hundred words.

"For a copy of such deposition furnished to a party on request, ten cents a folio.

"For entering any return, rule, order, continuance, judgment, decree, or recognizance, or drawing any bond, or making any record, certificate, return, or report, for each folio, fifteen cents.

"For a copy of any entry or record, or of any paper on file, for each folio, ten cents.

"For making dockets and indexes, issuing venire, taxing costs, and all other services, on the trial or argument of a cause where issue is joined and testimony given, three dollars.

"For making dockets and indexes, taxing costs, and all other services, in a cause where issue is joined, but no testimony is given, two dollars.

"For making dockets and indexes, taxing costs, and other services, in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, one dollar.

"For making dockets and taxing costs, in cases removed by writ of error or appeal, one dollar.

"For affixing the seal of the court to any instrument, when required, twenty cents.

"For every search for any particular mortgage, judgment, or other lien, fifteen cents.

"For searching the records of the court for judgments, decrees, or other instruments constituting a general lien on real estate, and certifying the result of such search, fifteen cents for each person against whom such search is required to be made.

"For receiving, keeping, and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept, and paid.

"For traveling from the office of the clerk, where he is required to reside, to the place of holding any court required by law to be held, five cents a mile for going and five cents for returning, and five dollars a day for his attendance on the court while actually in session.

"All books in the offices of the clerks of the (circuit and) district courts, containing the docket or minute of the judgments, or decrees thereof, shall, during office hours, be open to the inspection of any person desiring to examine the same without any fees or charge therefor." (4 Fed. Stats. Ann., 2d ed., p. 657; 2 U. S. Comp. Stats. 1916, § 1383.)

§ *840, Rev. Stats.* "That the Clerks of the several district courts in California and Nevada shall be entitled to charge and receive double the fees hereinbefore allowed to clerks, and shall be allowed, respectively, by the Attorney-General, to retain of the fees so received by them for their personal compensation, over and above the necessary expenses of their offices, including the salaries of deputy clerks, and necessary clerk-hire to be audited by the proper accounting officers of the Treasury Department, any sum not exceeding seven thousand dollars a year, nor exceeding that rate for any time less than a year. (4 Fed. Stats. Ann., 2d ed., p. 704; 2 U. S. Comp. Stats. 1916, § 1405, p. 2299.)

§ *1, Act Aug. 1, 1914, c. 223.* "That all Acts and parts of Acts authorizing the clerks of the United States district courts in and for the States of Oregon, Montana, and Washington, respectively, to charge and collect double the fees provided in section eight hundred and twenty-eight of the Revised Statutes of the United States, and all Acts authorizing United States marshals in and for said States, respectively, to receive and collect double the fees provided by section eight hundred and twenty-nine of the Revised Statutes of the United States, are hereby repealed, to take effect from and after January first, nineteen hundred and fifteen: *Provided,* That no clerk of the United States district courts in and for said States shall be allowed by the Attorney-General to retain of the fees and emoluments of his office, for his personal compensation, over and above his necessary office expenses, including the necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury, a sum exceeding $3,500 per year,

to take effect from and after January first, nineteen hundred and fifteen: Provided further, That nothing herein shall operate to reduce the fees that the clerks of the United States district courts and United States marshals in any States other than those mentioned herein have heretofore been authorized to charge and collect." (38 Stats. 654; 4 Fed. Stats. Ann., 2d ed., p. 705; 2 U. S. Comp. Stats. 1916, § 1406a, p. 2300.)

§ 413. Marshal's Fees. By § 6, Act May 28, 1896, c. 252, 4 Fed. Stats. Ann., 2d ed., p. 718, 2 U. S. Comp. Stats. 1916, § 1418, all fees and emoluments authorized by law to be paid United States marshals shall be charged as heretofore, and shall be collected as far as possible and paid into the treasury. The official himself, however, receives a salary as provided in § 9 of the act. (4 Fed. Stats. Ann., 2d ed., p. 736; 2 U. S. Comp. Stats. 1916, § 1421.)

The District of Columbia does not seem to be included.

§ *829, Rev. Stats.* "For service of any warrant, attachment, summons, capias, or other writ, except execution, venire, or a summons, or subpoena for a witness, two dollars for each person on whom service is made.

"For the keeping of personal property attached on mesne process, such compensation as the court, on petition setting forth the facts under oath, may allow.

"For serving venires and summoning every twelve men as grand or petit jurors, four dollars, or thirty-three and one-third cents each. In states where, by the laws thereof, jurors are drawn by lot, by constables, or other offices of corporate places, the marshal shall receive, for each jury, two dollars for the use of the officers employed in drawing and summoning the jurors and returning each venire, and two dollars for his own services in distributing the venires. But the fees for distributing and serving venires, drawing and summoning jurors by township officers, including the mileage chargeable by the marshal for each service, shall not at any court exceed fifty dollars.

"For holding a court of inquiry or other proceedings before a jury, including the summoning of a jury, five dollars;

and no further compensation shall be allowed for any copy, summons, or notice for a witness.

"For serving a writ of subpoena on a witness, fifty cents; and no further compensation shall be allowed for any copy, summons, or notice for a witness.

"For serving a writ of possession, partition, execution, or any final process, the same mileage as is allowed for the service of any other writ, and for making the service, seizing or levying on property, advertising and disposing of the same by sale, set off, or otherwise, according to law receiving and paying over the money, the same fees and poundage as are or shall be allowed for similar services to the sheriffs of the states, respectively, in which the service is rendered.

"For each bail bond, fifty cents.

"For summoning appraisers, fifty cents each.

"For executing a deed prepared by a party or his attorney, one dollar.

"For drawing and executing a deed, five dollars.

"For copies of writs or papers furnished at the request of any party, ten cents a folio.

"For every proclamation in admiralty, thirty cents.

"For serving an attachment *in rem* or a libel in admiralty, two dollars.

"For the necessary expenses of keeping boats, vessels, or other property attached or libeled in admiralty, not exceeding two dollars and fifty cents a day.

"When the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per centum on the first five hundred dollars of the claim or decree, and one-half of one per centum on the excess of any sum thereof over five hundred dollars: *Provided*, That, when the value of the property is less than the claim, such commission shall be allowed only on the appraised value thereof.

"For sale of vessels or other property under process in admiralty, or under the order of a court of admiralty, and for receiving and paying over the money, two and one-half per centum on any sum under five hundred dollars, and one and one-quarter per centum on the excess of any sum over five hundred dollars.

"For disbursing money to jurors and witnesses, and for other expenses, two per centum.

"For expenses while employed in endeavoring to arrest, under process, any person charged with or convicted of a crime, the sum actually expended, not to exceed two dollars a day, in addition to his compensation for service and travel.

"For every commitment or discharge of a prisoner, fifty cents.

"For transporting criminals, ten cents a mile for himself and for each prisoner and necessary guard; except in the case provided for in the next paragraph.

"For transporting criminals convicted of a crime in any district or territory where there is no penitentiary available for the confinement of convicts of the United States, to a prison in another district or Territory designated by the Attorney-General, the reasonable actual expense of transportation of the criminals, the marshal, and the guards, and the necessary subsistence and hire.

"For attending the circuit and district courts, when both are in session, or either of them when only one is in session, and for bringing in and committing prisoners and witnesses during the term, five dollars a day.

"For attending examinations before a commissioner, and bringing in, guarding, and returning prisoners charged with crime, and witnesses, two dollars a day; and for each deputy not exceeding two, necessarily attending, two dollars a day.

"For traveling from his residence to the place of holding court, to attend a term thereof, ten cents a mile for going only.

"For travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpoena in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service, or, when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on others. But when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs; and to save unnecessary expense, it shall be the duty of the clerk to in-

sert the names of as many witnesses in a cause in such subpoena as convenience in serving the same will permit.

"In all cases where mileage is allowed to the marshal he may elect to receive the same or his actual traveling expenses, to be proved on his oath, to the satisfaction of the court." (4 Fed. Stats. Ann., 2d ed., p. 678; 2 U. S. Comp. Stats. 1916, § 1386.)

As to the fees and compensation of marshals in Oregon, Montana and Washington, see Act Aug. 1, 1914, c. 223, quoted in the preceding section.

§ 414. Attorneys, Clerks and Marshals' Fees Under Civil Rights Laws.

§ *1986, Rev. Stats.* "The district attorneys, marshals, their deputies, and the clerks of the courts of the United States and territorial courts, shall be paid for their services, in cases under the foregoing provisions, the same fees as are allowed to them for like services in other cases; and where the proceedings are before a commissioner he shall be entitled to a fee of ten dollars for his services in each case, inclusive of all services incident to the arrest and examination." (2 Fed. Stats. Ann., 2d ed., p. 135; 4 U. S. Comp. Stats. 1916, § 3940.)

§ 415. Fees of United States Commissioners.

Part § 21, Act May 28, 1896, c. 252. "That each United States commissioner shall be entitled to the following named fees, and none other:

"Drawing a complaint, with oath and jurat to same, fifty cents.

"Copy of complaint, with certificate to same, thirty cents.

"Issuing warrant of arrest, seventy-five cents.

"Issuing a commitment and making a copy of same, one dollar.

"Entering a return, fifteen cents.

"Issuing subpoena or subpoenas in any one case, with five cents for each necessary witness in addition to the first, twenty-five cents.

"Drawing a bond of defendant and sureties, taking acknowledgment of same and justification of sureties, seventy-five cents.

"For administering an oath (except to witness as to attendance and travel), ten cents.

Recognizance of all witnesses in a case, when the defendant or defendants are held for court, fifty cents.

"Transcripts of proceedings, when required by order of court and transmission of original papers to court, sixty cents.

"Copy of warrant of arrest, with certificate to same, when defendant is held for court, and the original papers are not sent to court, forty cents.

"Order in duplicate to pay all witnesses in a case: For first witness, thirty cents, and for each additional witness, five cents, and for oath to each witness as to attendance and travel, five cents.

"For hearing and deciding on criminal charges and reducing the testimony to writing when required by law or order of court, five dollars a day for the time necessarily employed.

"*Provided,* That not more than one *per diem* shall be allowed in a case, unless the account shall show that the hearing could not be completed in one day, when one additional *per diem* may be especially approved and allowed by the court.

"*Provided, further,* That not more than one *per diem* shall be allowed for any one day.

"*Provided, further,* That no *per diem* shall be allowed for taking a bond or recognizance and passing on the sufficiency of the bond or recognizance and the sureties thereon when the bond or recognizance was taken after the defendant had been committed to prison upon a final commitment, or has given bond or been recognized for his appearance at court, or when the defendant has been arrested on a capias or bench warrant, or was in custody under any process or order of a court of record.

"For the examination and certificate in cases of application for discharge of poor convicts imprisoned for nonpayment of fine or fine and costs, and all services connected therewith, three dollars.

"For attending to a reference in a litigated matter, in a civil cause at law, in equity, or in admiralty, in pursuance of an order of the court, three dollars a day.

"For taking and certifying depositions to file in civil cases, ten cents for each folio.

"For each copy of the same furnished to a party on request, ten cents for each folio.

"For issuing any warrant under the tenth article of the treaty of August 9, 1842, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any parties charged with any crime or offense set forth in said article, two dollars.

"For issuing any warrant under the provision of the convention for the surrender of criminals between the United States and the King of the French, concluded at Washington, November 9, 1843, two dollars.

"For hearing and deciding upon the case of any person charged with any crime or offense, and arrested under the provisions of said treaty or of said convention, five dollars a day for the time necessarily employed. . . . " (29 Stats. 184; 4 Fed. Stats. Ann., 2d ed., p. 743; 2 U. S. Comp. Stats. 1916, § 1451.)

§ 416. Same—Under Chinese Exclusion Laws.

§ 2, *Act March 3, 1901, c. 845.* "A United States Commissioner shall be entitled to receive a fee of five dollars for hearing and deciding a case arising under the Chinese Exclusion laws." (31 Stats. 1093; 2 Fed. Stats. Ann., 2d ed., p. 108; 5 U. S. Comp. Stats. 1916, § 4333.)

§ 417. Costs and Witness Fees in Extradition Cases.

§ 4, *Act Aug. 3, 1882, c. 378.* "That all witness fees and costs of every nature in cases of extradition, including the fees of the commissioner, shall be certified by the judge or commissioner before whom the hearing shall take place to the Secretary of State of the United States, who is hereby authorized to allow the payment thereof out of the appropriation to defray the expenses of the judiciary; and the Secretary of State shall cause the amount of said fees and costs so allowed to be reimbursed to the Government of the United States by the foreign government by whom the proceedings for extradition may have been instituted." (22 Stats. 216; 3 Fed. Stats. Ann., 2d ed., p. 313; 10 U. S. Comp. Stats. 1916, § 10,115.)

§ 418. Witnesses' Fees.

§ *848, Rev. Stats.* "For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. When a witness is subpoenaed in more than one cause between the same parties, at the same court, only one travel fee and one *per diem* compensation shall be allowed for attendance. Both shall be taxed in the case first disposed of, after which the *per diem* attendance fee alone shall be taxed in the other cases in the order in which they are disposed of.

"When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of one dollar a day." (Fed. Stats. Ann., 2d ed., title "Witnesses"; 2 U. S. Comp. Stats. 1916, § 1452.)

§ *1, Act May 27, 1908, c. 200.* (Fees and mileage of jurors and witnesses in certain states and territories.) "Jurors and witnesses in the United States courts in the States of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado and Utah, and in the territories of New Mexico and Arizona shall be entitled to receive for actual attendance at any court or courts and for the time necessarily occupied in going to and returning from the same, three dollars a day, and fifteen cents for each mile necessarily traveled over any stage line, or by private conveyance, and five cents for each mile by any railway or steamship in going to and returning from said courts: Provided that no constructive or double mileage fees shall be allowed by reason of any person being summoned as both a witness and juror, or as a witness in two or more cases pending in the same court and triable at the same term thereof." (35 Stats. 377; 6 Fed. Stats. Ann., 2d ed., p. 239; 2 U. S. Comp. Stats. 1916, § 1453, p. 2339.)

Witness fees in extradition cases are set out, § 417, *supra.*

Witnesses before the Interstate Commerce Commission are entitled to the same fees and mileage as are paid to witnesses in the federal courts. (Part § 18, Act Feb. 4, 1887, c. 104; 24 Stats.

386; 4 Fed. Stats. Ann., 2d ed., p. 499; 8 U. S. Comp. Stats. 1916, § 8587.)

Other matters relating to witness fees are in the following sections:

§ 419. Court Officer not Entitled to Witness Fees.

§ *849, Rev. Stats.* "No officer of the United States courts, in any state or territory, or in the District of Columbia, shall be entitled to witness fees for attending before any court or commission where he is officiating." (Fed. Stats. Ann., 2d ed., title "Witnesses"; 2 U. S. Comp. Stats. 1916, § 1454.)

§ 420. Witness Fees Depositions in District of Columbia.

§ *874, Rev. Stats.* "Every witness appearing and testifying under the said provisions relating to the District of Columbia shall be entitled to receive for each day's attendance, from the party at whose instance he is summoned, the fees now provided by law for each day he shall give attendance." (3 Fed. Stats. Ann., 2d ed., p. 196; 3 U. S. Comp. Stats. 1916, § 1485.)

§ 421. Same — Under Letters Rogatory from a Foreign Country.

§ *4074, Rev. Stats.* "Every witness who shall so appear and testify shall be allowed, and shall receive from the party at whose instance he shall have been summoned, the same fees and mileage as are allowed to witnesses in suits depending in the district courts of the United States." (3 Fed. Stats. Ann., 2d ed., p. 224; 7 U. S. Comp. Stats. 1916, § 7622.)

§ 422. Witness Fees of Seamen.

§ *851, Rev. Stats.* "There shall be paid to each seaman or other person who is sent to the United States from any foreign port, station, sea, or ocean, by any United States minister, *chargé d'affaires,* consul, captain, or commander, to give testimony in any criminal case depending in any court of the United States, such compensation, exclusive of subsistence and transportation, as such court may adjudge to be proper,

not exceeding one dollar for each day necessarily employed in such voyage, and in arriving at the place of examination or trial. In fixing such compensation, the court shall take into consideration the condition of said seaman or witness, and whether his voyage has been broken up, to his injury, by his being sent to the United States. When such seaman or person is transported in an armed vessel of the United States, no charge for subsistence or transportation shall be allowed. When he is transported in any other vessel, the compensation for his transportation and subsistence, not exceeding in any case fifty cents a day, may be fixed by the court, and shall be paid to the captain of said vessel accordingly." (Fed. Stats. Ann., 2d ed., title "Witnesses"; 2 U. S. Comp. Stats. 1916, § 1456.)

§ *1, Act July 1, 1916, c. 209.* "That courts of the United States shall be open to seamen, without furnishing bonds or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name and for their own benefit for wages or salvage and to enforce laws made for their health and safety." (Pamphlet Supp., Fed. Stats. Ann., No. 8, p. 128; 3 U. S. Comp. Stats. 1916, § 1630a, p. 3240.)

§ 423. United States Liable for Only Four Witness Fees on Preliminary Criminal Examination.

§ *981, Rev. Stats.* "In no case shall the fees of more than four witnesses be taxed against the United States, in the examination of any criminal case before a commissioner of a circuit court, unless their materiality and importance are first approved and certified to by the district attorney for the district in which the examination is had; and such taxation shall be subject to revision as in other cases." (2 Fed. Stats. Ann., 2d ed., p. 643; 3 U. S. Comp. Stats. 1916, § 1622.)

§ 424. Witness Fees in Prize Cases—How Paid.

§ *4651, Rev. Stats.* "Whenever the court shall allow fees to any witness in a prize cause, or fees for taking evidence out of the district in which the court sits, and there is no money subject to its order in the cause, the same shall be paid by the

marshal, and shall be repaid to him from any money deposited to the order of the court in the cause; and any amount not so repaid the marshal shall be allowed as witness fees paid by him in cases in which the United States is a party." (Fed. Stats. Ann., 2d ed., title "Prizes"; 7 U. S. Comp. Stats. 1916, § 8425.)

See, also, § 426, *infra*, as to mode of payment of witness and juror fees.

§ 425. Juror Fees—Grand and Petit.

§ *852, Rev. Stats.* "For actual attendance at any court or courts, and for the time necessarily occupied in going to and returning from the same, three dollars a day during such attendance. For the distance necessarily traveled from their residence in going to and returning from said court by the shortest practicable route five cents a mile." (6 Fed. Stats. Ann., 2d ed., title "Juries"; 2 U. S. Comp. Stats. 1916, § 1457.)

§ 426. Mode of Payment Juror and Witness Fees.

§ *855, Rev. Stats.* "In cases where the United States are parties, the marshal shall, on the order of the court, to be entered on its minutes, pay to the jurors and witnesses all fees to which they appear by such order to be entitled, which sum shall be allowed him at the Treasury in his accounts." (4 Fed. Stats. Ann., 2d ed., p. 709; 2 U. S. Comp. Stats. 1916, § 1461.)

§ 427. Printer's Fees.

§ *853, Rev. Stats.* "For publishing any notice or order required by law, or the lawful order of any court, Department, Bureau, or other person, in any newspaper, except as mentioned in sections 3823, 3824 and 3825, title 'Public Printing, Advertisements, and Public Documents,' forty cents per folio for the first insertion, and twenty cents per folio for each subsequent insertion. The compensation herein provided shall include the furnishing of lawful evidence, under oath, of publication, to be made and furnished by the printer or publisher making such publication." (2 Fed. Stats. Ann., 2d ed., p. 635; 2 U. S. Comp. Stats. 1916, § 1459.)

§ 428. Same—Folio Defined.

§ *854, Rev. Stats.* "The term 'folio' in this chapter shall mean one hundred words, counting each figure as a word. When there are over fifty and under one hundred words, they shall be counted as one folio; but a less number than fifty words shall not be counted, except when the whole statute, notice, or order contains less than fifty words." (2 Fed. Stats. Ann., 2d ed., p. 636; 2 U. S. Comp. Stats. 1916, § 1460.)

§ 429. Appraiser's Fees on Execution Sales.

Last Part § *993, Rev. Stats.* " . . . When such appraisers attend they shall be entitled to the like fees as in cases of appraisement under the laws of the State." (3 Fed. Stats. Ann., 2d ed., p. 239; 3 U. S. Comp. Stats. 1916, § 1639.)

§ 430. No Costs Against United States in Internal Revenue Suits upon Information.

§ *969, Rev. Stats.* "When a suit for the recovery of any penalty or forfeiture accruing under any law providing internal revenue is brought upon information received from any person other than a collector, deputy collector, or inspector of internal revenue, the United States shall not be subject to any costs of suit." (2 Fed. Stats. Ann., 2d ed., p. 638; 3 U. S. Comp. Stats. 1916, § 1610.)

§ 431. No Costs Against Prosecutor nor for Claimant When Reasonable Cause for Seizure.

§ *970, Rev. Stats.* "(Claimant not entitled to costs when reasonable cause of seizure.) When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: *Provided,* That the vessel,

goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent." (2 Fed. Stats. Ann., 2d ed., p. 638; 3 U. S. Comp. Stats. 1916, § 1611.)

§ 432. Successful Claimant Entitled to Possession When His Own Costs Paid.

§ *979, Rev. Stats.* "When judgment is rendered in favor of the claimant of any vessel or other property seized on behalf of the United States, and libeled or informed against as forfeited under any law thereof, he shall be entitled to possession of the same when his own costs are paid." (2 Fed. Stats. Ann., 2d ed., p. 643; 3 U. S. Comp. Stats. 1916, § 1620.)

§ 433. Double Costs Against Nonsuited Plaintiff in Action Against Revenue Officer.

§ *971, Rev. Stats.* "If, in any suit against an officer or other person executing or aiding or assisting in the seizure of goods, under any act providing for or regulating the collection of duties on imports or tonnage, the plaintiff is nonsuited, or judgment passed against him, the defendant shall recover double costs." (2 Fed. Stats. Ann., 2d ed., p. 640; 3 U. S. Comp. Stats. 1916, § 1612.)

§ 434. Defendant Subjected to Fine, Forfeiture or Conviction shall Pay Costs of Prosecution.

§ *974, Rev. Stats.* "(When costs of prosecution to be paid by defendant.) When judgment is rendered against the defendant in a prosecution for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs; and on every conviction for any other offense not capital, the court may, in its discretion, award that the defendant shall pay the costs of the prosecution." (2 Fed. Stats. Ann., 2d ed., p. 641; 3 U. S. Comp. Stats. 1916, § 1615.)

§ 435. Defendant to be Awarded Costs if Informer on Penal Statute Nonsuited or Discontinues.

§ *975, Rev. Stats.* "If any informer or plaintiff on a penal statute, to whom the penalty or any part thereof, if recovered,

is directed to accrue, discontinues his suit or prosecution or is nonsuited therein, or if, upon trial, judgment is rendered in favor of the defendant, the court shall award the defendant his costs, unless such informer or plaintiff is an officer of the United States specially authorized to commence such prosecution, and the court, at the trial in open court, certifies upon the record that there was a reasonable cause for commencing the same; in which case no costs shall be adjudged to the defendant." (2 Fed. Stats. Ann., 2d ed., p. 642; 3 U. S. Comp. Stats. 1916, § 1616.)

§ 436. Informer on Penal Statute to Pay Costs if Nonsuit or Discontinuance.

§ *976, Rev. Stats.* "If any informer on a penal statute, to whom the penalty or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution, or is nonsuited therein, or if upon trial judgment is rendered in favor of the defendant, such informer shall be alone liable to the clerk, marshal, and attorney for the fees of such prosecution, unless he is an officer of the United States whose duty it is to commence such prosecution, and the court certifies that there was reasonable cause for commencing the same; in which case the United States shall be responsible for such fees." (2 Fed. Stats. Ann., 2d ed., p. 642; 3 U. S. Comp. Stats. 1916, § 1617.)

§ 437. Costs in Copyright Suits.

§ *972, Rev. Stats.* "In all recoveries under the copyright laws, either for damages, forfeitures, or penalties, full costs shall be allowed thereon." (2 Fed. Stats. Ann., 2d ed., p. 640; 3 U. S. Comp. Stats. 1916, § 1613.)

§ *40, Act March 4, 1909, c. 320.* "That in all actions, suits, or proceedings under this act, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs." (35 Stats. 1084; 2 Fed. Stats. Ann., 2d ed., p. 608; 9 U. S. Comp. Stats. 1916, § 9562.)

§ 438. Costs on Infringement of Patent.

§ *973, Rev. Stats.* "When judgment or decree is rendered for the plaintiff or complainant, in any suit at law or in equity,

for the infringement of a part of a patent, in which it appears that the patentee, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor, no costs shall be recovered, unless the proper disclaimer, as provided by the patent laws, has been entered at the Patent Office before the suit was brought." (2 Fed. Stats. Ann., 2d ed., p. 640; 3 U. S. Comp. Stats. 1916, § 1614.)

§ *4922, Rev. Stats.* "Whenever, through inadvertence, accident, or mistake, and without any wilful default or intent to defraud or mislead the public, a patentee has, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor or discoverer, every such patentee, his executors, administrators, and assigns, whether of the whole or any sectional interest in the patent, may maintain a suit at law or in equity, for the infringement of any part thereof, which was *bona fide* his own, if it is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right, notwithstanding the specifications may embrace more than that of which the patentee was the first inventor or discoverer. But in every such case in which a judgment or decree shall be rendered for the plaintiff no costs shall be recovered unless the proper disclaimer has been entered at the Patent Office before the commencement of the suit. But no patentee shall be entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer." (Fed. Stats. Ann., 2d ed., title "Patents"; 8 U. S. Comp. Stats. 1916, § 9468.)

CHAPTER 15.

AN ACTION AT LAW—SUMMARY.

SEC.

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§ 450. In General.

§ *914, Rev. Stats.* "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the [circuit and] district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such [circuit or] district courts are held, any rule of court to the contrary not withstanding." (6 Fed. Stats. Ann., 2d ed., p. 21; 3 U. S. Comp. Stats. 1916, § 2912 et seq.)

§ *918, Rev. Stats.* "The several [circuit and] district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." (6 Fed. Stats. Ann., 2d ed., p. 77; 3 U. S. Comp. Stats. 1916, § 1544, p. 3095 et seq.)

Under the foregoing provisions, an action at law conforms in many particulars to a similar action in the state courts of record of the state wherein the federal district is located. But there are a number of federal statutes that exist governing matters of procedure which prevent a complete uniformity with the practice in the several states. There are other matters concerning which the federal judges, in the exercise of their discretion, have refused to follow the state rules or laws.

The object of this chapter is to summarize the conduct of an action at law with reference to conformity with state laws.

§ 451. Initial Pleading. (Chapter 16, *post.*) The initial pleading conforms as to form and sufficiency except that it is necessary to show (1) ground of federal jurisdiction, (2) ground of legal jurisdiction, that the causes of action are legal as distinguished from equitable, and legal and equitable causes are not permitted to be joined in the same petition, (3) the requisite amount in controversy, and (4) that venue is properly laid. (See §§ 470, 474, *infra.*)

As to *parties* under subdivision first, § 24, Jud. Code, assignees may not sue except when the assignor or assignors could have sued in the federal court. (See § 97, *infra.*)

Joinder of parties is governed by § 50, Jud. Code. Survival of right of action in the executor or administrator is governed by § 55, Jud. Code. In other respects rules of state courts as to parties will govern as in case of suits by assignees, assigning causes of action for torts, executors and administrators, misjoinder of plaintiffs or defendants and right of action for death.

§ 452. Attachment and Garnishment. (Chapter 17, post.) The remedies of attachment and garnishment are given in conformity to state laws under § 915, Rev. Stats., except as against national banks under § 5242, Rev. Stats. (See § 480, *infra.*)

It is presumed that the federal courts have adopted the state laws on this subject, and they follow the state courts' construction of state attachment statutes. (See § 482, *infra.*)

But attachment cannot be made a basis of jurisdiction so as to authorize service by publication. The federal courts do not follow state practice in jurisdictional matters. (See § 483, *infra.*)

The state statutes are followed as to causes of action in which attachments will issue, the property subject to attachment, the grounds for attachment to be stated in the affidavit, the bonds given to obtain or release, the form of writ, the effect of lien, priorities, third-party claims, and under § 933, Rev. Stats., the dissolution of the attachment. (See § 494, *infra.*)

But state laws are not followed as to amendments of the affidavit or the writ, amendments being governed by § 948, Rev. Stats., for amending process. (See § 487, *infra.*)

In like manner, state laws are followed in garnishment proceedings under § 915, Rev. Stats., relating to attachments and § 916, Rev. Stats., relating to executions, but not as to amendments under § 948, Rev. Stats., relating to amendment process and § 954, Rev. Stats., relating to amendments generally.

There are special provisions as to attachments in postal suits and garnishments in suits by the government against corporations.

§ 453. Process. (Chapter 18, *post.*) The time when suit begins follows state law; so also the state statute of limitations. (§ 521, *infra.*)

The form and body of process follows the state practice, but the signature, seal and test are governed by §§ 911, 912, Rev. Stats., and amendment of, by §§ 948, 954, Rev. Stats., and the sufficiency of process and service are governed by federal decisions. (§§ 522–523, *infra.*)

The marshal or his deputy serve the process as required by §§ 787, 788, Rev. Stats. But the method of personal service follows state practice, although substituted service is governed by § 57, Jud. Code.

The federal decisions govern special appearance. (§§ 524–526, *infra.*)

§ 262, Jud. Code, allows other writs not provided by statute.

§ 454. Defensive Pleading. (Chapter 19, *post.*) The time and order of pleading follow state practice. Defaults may conform to state law under § 918, Rev. Stats. (§ 542, *infra.*) So do also the sufficiency and scope of the pleading. Pleas in abatement, demurrers, answers, setoffs, or counterclaims and replications, when provided by state practice, will be used in like cases in the federal courts. State rules as to verification are followed. (§§ 541, 543, 544, *infra.*)

Under § 274b, Jud. Code, added by amendment Act March, 3, 1915, chapter 90, equitable defenses are now permitted in an action at law. (§ 545, *post.*)

§ 455. Amendment. Amendment of pleading is covered by § 954, Rev. Stats. (§ 546, *infra.*)

Amendment of process by the same section and also § 948, Rev. Stats. (§ 523, *infra.*)

§ 456. Continuances and Adjournments. (Chapter 20, *post.*) Continuances conform to state practice except as modified by §§ 955 and 956, Rev. Stats., on the death of a party;-§ 957, Rev. Stats., in suits against a delinquent for public money; § 958, Rev. Stats., in postal suits; § 959, Rev. Stats., suits on debentures; and § 960, Rev. Stats., suits under tariff laws. (§§ 561–566, *infra.*) There are also provisions for adjournments when the judge is unable to act, § 12, Jud. Code, or his office becomes vacant, under § 22, Jud. Code, and for concluding in a new term trials already commenced, under § 8, Jud. Code.

§ 457. Consolidation. Consolidation of suits under § 921, Rev. Stats., conforms to state practice. § 920, Rev. Stats., provides for consolidation for revenue seizure case. (§ 570, *infra.*)

§ 458. Trial by Jury. (Chapter 22, *post.*) The right of trial by jury is guaranteed by the seventh Amendment of the United States Constitution, and is provided for by § 566, Rev. Stats.

Chapter 12, Jud. Code, as to juries, sets out the provisions governing the qualifications and exemptions of jurors, the matters of impaneling, venire, talesmen, special jury, challenges, etc. The conduct of a jury trial, being a matter of personal administration of the judge, does not conform to state laws. Thus, there is not a conformity with respect to the scintilla of evidence rule, nor with respect to withdrawing case from the jury or permitting the jury to separate or submitting special issues or waiving jury.

§ 459. Trial by Judge. (§ 594, *post.*) By § 291, Jud. Code, the powers and duties of circuit courts are imposed upon district courts, and hence under §§ 649 and 700, Rev. Stats., the district judge would have authority to try questions of fact on waiver of jury. The admission and exclusion of evidence can only be considered when excepted to at the time and duly presented by bill of exceptions under § 700, Rev. Stats. The findings of fact by the judge are equivalent to verdict by the jury under §§ 649, 700, 1011, Rev. Stats.

§ 460. Depositions (chapter 13, *supra*). **Evidence** (chapter 11, *supra*), **Witnesses** (chapter 12, *supra*). The causes for taking depositions are set out in §§ 863 and 866, Rev. Stats., and the methods of taking same are provided for in §§ 863 to 870, Rev. Stats., inclusive, but may be in the same manner though not for the same cause as provided in the state practice, under Act March 9, 1892, chapter 14.

There are many statutory provisions relating to special matters of evidence, permitting copies of documents of departments, the record and exemplification of books kept by public officers of a state or territory, copies of foreign records, evidence of acts of state legislatures, and records of judicial proceedings. This subject is treated in chapter 11.

The competence of witnesses conforms under § 858, Rev. Stats. State laws are followed as to credibility. The examination and cross-examination of witnesses conform to state practice under

§ 861, Rev. Stats., but not as to the examination of a *party* before trial. See § 724, Rev. Stats., § 571, *post*.

Subpoenas for witnesses are authorized under §§ 876 and 877, Rev. Stats., and in contested patent cases under § 4906, Rev. Stats., and their attendance is enforced under § 268, Jud. Code; so, also, the answers of witnesses may be enforced under § 268, Jud. Code, and in contested patent cases under § 4908, Rev. Stats. The production of books is provided for in § 724, Rev. Stats., and *subpoena duces tecum* under §§ 724 and 869, Rev. Stats. The materiality of evidence and the effect of withdrawing erroneously admitted evidence are governed by federal decisions. The subject of witnesses is treated in detail, chapter 12, *supra*.

§ 461. Charge to Jury and Verdict. The charge to the jury is also a matter of personal administration of the judge, and is governed by the federal decisions. Thus state laws forbidding comments on evidence are not followed. Section 918, Rev. Stats., governs the giving of special charges. Exceptions to charges are governed by Circuit Courts of Appeal Rule 10 (Appendix, *post*) and Supreme Court Rule 4 (Appendix, *post*). (§ 615, *post*.) The form and effect of a verdict conform to state practice, but the directing of a verdict is governed by the federal decisions. (§ 611, *infra*.)

§ 462. Judgment and New Trial (chapter 24, *post*). Judgments in law actions may conform by general rule to state laws under § 914, Rev. Stats., as to allowance of interest by § 966, Rev. Stats. (§ 623, *post*), recording, docketing, and indexing under the Act of August 1, 1888, chapter 729 (§§ 625, 626, 627, *post*). The manner, effect, and extent of the lien or judgments conform under the last-mentioned act, and when they cease to be liens under § 967, Rev. Stats. (§ 627, *post*), and the lien is preserved on change of boundaries by § 60, Jud. Code (§ 628, *post*). Judgments by default are authorized by § 918, Rev. Stats. (§ 542, *post*). Amendment of judgments is governed by § 954, Rev. Stats. (§ 629, *post*),

and vacation of judgments is governed by Federal decisions (§ 630, *post*). New trials are governed by § 269, Jud. Code (§ 613, *post*).

§ 463. Execution (§ 621, *post*). Executions on judgments in law actions may conform by general rule to state statutes under § 916, Rev. Stats. (§ 631, *post*), but do not run against revenue officers for moneys paid on probable cause into the treasury, under § 989, Rev. Stats. (§ 632, *post*).

Stay of execution pending motion for new trial is governed by § 987, Rev. Stats. (§ 633, *post*), and there is partial conformity to state law under § 988, Rev. Stats. (§ 634, *post*), allowing a stay for one term.

Executions run to any part of the state under § 985, Rev. Stats. (§ 635, *post*), and on judgments in favor of the United States to any part of the United States, under § 986, Rev. Stats. (§ 635, *post*).

Place of sale of real and personal property is governed by §§ 1 and 2, Act March 3, 1893, chapter 225 (§ 640, *post*).

Publication of notice of sale of real estate by § 3 (§ 641, *post*) of the same act and proceedings are not interrupted by vacancy in the marshal's office, under § 994, Rev. Stats. (§ 642, *post*). The government may be a purchaser in its own suits under § 3470, Rev. Stats. (§ 643, *post*).

Appraisal of personal property sold on execution may conform to state laws under § 993, Rev. Stats. (§ 644, *post*).

State laws may be followed regarding abolishment of imprisonment for debt under § 990, Rev. Stats. (§ 636, *post*), and for the discharge of a person from arrest or imprisonment in civil cases under § 991, Rev. Stats. (§ 637, *post*). In government cases a poor debtor may be discharged from imprisonment by the Secretary of the Treasury under § 3471, Rev. Stats. (§ 638, *post*), or by the President under § 3472, Rev. Stats. (§ 639, *post*).

CHAPTER 16.

THE INITIAL PLEADING—LAW ACTIONS.

SEC.

470. Differences Between Federal and State Initial Pleadings.
471. Effect of Failure to Show Jurisdictional Grounds.
472. Effect of Erroneously Beginning as a Suit in Equity.
473. Legal and Equitable Causes of Action may not be Joined.
474. Form of Initial Pleading.

§ 470. Differences Between Federal and State Initial Pleadings. Under § 914, Rev. Stats., the initial pleading in actions at law as distinguished from suits in equity conforms "as near as may be" to the pleadings and forms existing at the time in like causes in the courts of record of the state within which the federal courts are held.

Because, however, of the limited jurisdiction of the federal courts and the distinction that exists in such courts between law and equity cases in respect to practice, pleading, forms and mode of proceeding, it is necessary for the initial pleading in an action at law in the federal court to disclose, in addition to those matters required to make a good pleading in the state court of record of the state within which the federal court is held: (1) Some ground of federal jurisdiction, (2) the proper amount in controversy, (3) facts showing that the cause of action is legal in its nature as distinguished from equitable, (4) proper venue under federal laws.

In other respects the initial pleading, a petition, declaration, or complaint, in an action at law in the federal court, is governed by the state statutes and rules in like causes in the courts of record of the state in which the federal court is located.[1] There should

[1] Beers v. Haughton, 9 Pet. (U. S.) 359, 9 L. Ed. 155; Ex parte Boyd, 105 U. S. 647, 26 L. Ed. 1200; Indianapolis etc. R. Co. v. Horst, 93 U. S. 300, 23 L. Ed. 901; United States Bank v. Halstead, 10 Wheat. (U. S.) 51, 6 L. Ed. 264; Parsons v. Bedford, 3 Pet. (U. S.) 448, 7 L. Ed. 737; Matter of Freeman, 2 Curt. 491, Fed. Cas. No. 5083; United States v. Knight, 3 Sumn. 358, Fed. Cas. No. 15,539.

also be consulted the federal district court rules of the district in which the action is brought as to the details of methods of doing business of these courts under the authority of § 918, Rev. Stats., giving power to regulate by rules their own practice.[2]

§ 471. Effect of Failure to Show Jurisdictional Grounds.

§ *37, Jud. Code.* "If in any suit commenced in a district court, or removed from a state court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require and shall make such order as to costs as shall be just." (5 Fed. Stats. Ann., 2d ed., p. 398; 1 U. S. Comp. Stats. 1916, § 1019, p. 1033; Foster's Federal Practice, 5th ed., p. 1169.)

§ 472. Effect of Erroneously Beginning as a Suit in Equity.

Equity Rule 22. "If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential." (3 U. S. Comp. Stats. 1916, § 1536, p. 2502; Foster's Federal Practice, 5th ed., pp. 336, 725, 1184; Simkins' Federal Equity Suit, 3d ed., pp. 27, 28, 29, 302, 552.)

§ *274a, Jud. Code, added by Act March 3, 1915, c. 90.* "That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendment to the pleadings which may be necessary to conform them

[2] Ewing v. Burnham, 74 Fed. 384; Mutual Bldg. Fund etc. Savings Bank v. Bossieux, 1 Hughes, 386, Fed. Cas. No. 9977.

to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form." (38 Stat. 956; 5 Fed. Stats. Ann., 2d ed., p. 1059; 2 U. S. Comp. Stats. 1916, § 1251a, p. 2023; 226 Fed. 653; 227 Fed. 199; 228 Fed. 577; 231 Fed. 654; 233 Fed. 309; 237 Fed. 61.)

§ 473. Legal and Equitable Causes of Action may not be Joined. The fact that a state statute abolishes the forms of action has no effect on the forms of pleading in equity suits in the federal courts in that state, nor does such statute in fact change or destroy the essential distinctions that exist between law and equity cases, to wit: (1) in their manner of trial, at law by a jury, in equity by the judge; (2) in the nature of the remedies granted, in law, compensatory or possessory, which if adequate and complete will preclude the granting of equitable remedies, such as injunction, specific performance, and the like; and, (3) in the manner of enforcement of the court's orders, in all cases applicable by the writ of execution and such other process as the state statute may give, but in equity under Equity Rule 8, by acting *in personam* by means of contempt proceedings wherever it is necessary to so enforce the orders and secure the relief sought.

§ 474. Form of Initial Pleading. The following is given merely by way of suggestion and illustration, and will vary according to the state practice where the federal court is situated. There should be the usual caption followed by a statement of the citizenship and residence of the parties; the ground or grounds of federal jurisdiction, amount in controversy, and a statement of a cause of action, legal in its nature, to wit: requiring a possessory

or compensatory remedy without equitable incidents. The prayer for relief should be signed by counsel and verified as required by the state practice. The form below will illustrate:

In the District Court of the United States Within and for the District of ——,
—— Division.

John Jones,
Plaintiff,
v.
Henry Smith,
Defendant.

COMPLAINT AT LAW.
MONEY (OR POSSESSION).

John Jones, for his cause of action, alleges:

I. That he is a citizen of the state of ——, residing at —— in said state, and the defendant is a citizen of the state of ——, residing at ——, county of ——, in said state.

II. [Here set out the ground of federal jurisdiction and, if material, the amount or value involved.]

III. [A statement of facts showing that the claim is legal, in other words, a statement of a cause of action for which the remedies or compensation or possession will be complete and adequate, and not requiring the interposition of equity.]

IV. [The prayer for relief.]

V. [Signature and verification as prescribed by state practice of the state where the federal court is located.]

It is well to set out the citizenship and residence of the parties, whether the case depends on diverse citizenship or not, as that will give uniformity of pleading in all suits and, except in local actions, will also show whether the venue has been properly laid.[3]

The only remedies that may be sought in a federal suit at law are possessory or compensatory, and the initial pleading in a suit at law can seek these remedies, and no others.

3 Whithead v. Shattuck, 138 U. S. 146, 34 L. Ed. 873, 11 Sup. Ct. 276; South Penn Oil Co. v. Miller, 175 Fed. 729, 735, 99 C. C. A. 305. See, also, Beatty v. Wilson, 161 Fed. 453.

CHAPTER 17.

ATTACHMENT AND GARNISHMENT IN LAW CASES.

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§ 480. Attachment and Garnishment—Adoption of State Laws Except Against National Banks.

§ *915, Rev. Stats.* "In common-law causes in the [circuit and] district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process: *Provided,* That similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy." (6 Fed. Stats. Ann., 2d ed., p. 64; 3 U. S. Comp. Stats. 1916, § 1539, p. 3069.)

Not Against National Banks.

Part, § *5242, Rev. Stats.* " . . . no attachment . . . shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court." (6 Fed. Stats. Ann., 2d ed., p. 903; 9 U. S. Comp. Stats. 1916, § 9834.)

Under § 5242, Rev. Stats., above quoted, the power to issue attachments against national banks being eliminated from state statutes, there would be no right to same in the federal courts under § 915, Rev. Stats., allowing adoption of state laws.[1]

Property transferred to the alien property custodian is not liable to attachment except as provided in Act Oct. 6, 1917. (See § 513, *post.*)

1 Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. Ed. 570, 8 Sup. Ct. 718.

§ 481. Rules by Federal Courts Adopting State Attachment Remedies. The rules adopting state laws for attachment proceedings need not be in writing.[2]

It is presumed that the federal courts have adopted the state statutes.[3]

The federal courts have a large discretion in these matters.[4]

§ 482. Construction of State Attachment Statutes by State Courts Followed in Federal Courts. The scope, meaning and application of the state attachment law and practice under it as construed by the state courts will be followed in the federal courts.[5]

§ 483. Attachment not a Basis for Substituted Service, but Merely a Provisional Remedy. Attachments in the federal courts cannot be made the basis for service on an absent defendant by publication because of the requirements of § 51 of the Jud. Code as to the venue of actions requiring the suit to be brought in the district of a defendant's residence, except as in the succeeding sections provided. § 57, Jud. Code, allows service by publication on absent defendants in suits to enforce liens or remove clouds from title.

"The attachment proceeding, therefore, in the courts of the United States, has altogether a different character from that proceeding *in rem* in common use in the states, the object of which is either to enforce the appearance of the absent defendant or to subject his property to the payment of his debts. In the federal courts there must be jurisdiction over the person of the defendant and of a subject matter, independent of the proceed-

2 Citizens' Bank v. Farwell, 56 Fed. 570, 6 C. C. A. 24; Logan v. Goodwin, 104 Fed. 490, 43 C. C. A. 658; United States v. Stevenson, 1 Abb. 495, Fed. Cas. No. 16,395.

3 Logan v. Goodwin, 104 Fed. 490, 43 C. C. A. 658; Lowry v. Story, 31 Fed. 771; Fullerton v. United States Bank, 1 Pet. (U. S.) 604, 7 **L. Ed.** 280.

4 Shepard v. Adams, 168 U. S. 625, 42 **L. Ed.** 602, 18 Sup. Ct. 214.

5 Third Nat. Bank of Baltimore v. Teal, 5 Fed. 503, 4 Hughes, 572; Fleitas v. Cockrem, 101 U. S. 301, 25 **L. Ed.** 954.

ing in attachment, and without which no attachment can be effectual."[6]

"It is conceded that the person against whom this suit was brought in the circuit court (of the United States for the district of Iowa) was an inhabitant of the state of Massachusetts, and was not found in or served with process in Iowa. Clearly, then, he was not suable in the circuit court of the district of Iowa, and unless he could be sued no attachment could issue for that court against his property."[7]

In Bucyrus v. McArthur (M. D. Tenn.), 219 Fed. 266, at pages 268, 269, the court said:

> "It is well settled that the federal courts, under the provisions of the laws of the United States governing the issuance of process are not authorized to issue foreign attachments as the original process commencing suits against defendants not amenable to personal service of process. Toland v. Sprague, 12 Pet. (U. S.) 300, 329, 9 **L. Ed.** 1093; Saddler v. Hudson, 2 Curt. 6, 21 Fed. Cas. 135, No. 12,206; Dormitzer v. Illinois etc. Bridge Co. (C. C.), 6 Fed. 217, 218. And see Courtney v. Pradt (6th Cir.), 160 Fed. 561, 562, 87 C. C. A. 463, citing Chicago etc. R. Co. v. Sturn, 174 U. S. 710, 715, 43 **L. Ed.** 1144, 19 Sup. Ct. 797. And section 915 of the Revised Statutes (derived from the act of June 1, 1872, c. 255, § 6, 17 Stats. 187), adopting in common-law causes in the federal courts the laws of the several states in relation to attachments and other process against the property of defendants, merely authorizes the issuance of ancillary attachments for the purpose of impounding the property of defendants of whose person the court may otherwise acquire jurisdiction. Chittenden v. Darden, 2 Woods, 437, 5 Fed. Cas. 642, No. 2688; Nazro v. Cragin, 3 Dill. 474, 17 Fed. Cas. 1259, 1260, No. 10,062; North v. McDonald, 1 Biss. 57, 18 Fed. Cas. 332, 333, No. 10,312; Anderson v. Shaffer (C. C.), 10 Fed. 266, 267; Boston Elec. Co. v. Electric Gas-Lighting Co. (C. C.), 23 Fed. 838, 839; and, by implication, Ex parte Des Moines etc. R. R. Co., 103 U. S. 794, 796, 26 **L. Ed.**

[6] Erstein v. Rothschild, 22 Fed. 61. See, also, Lovejoy v. Hartford F. Ins. Co., 11 Fed. 63; Lackett v. Rumbaugh, 45 Fed. 23, 29.

[7] Ex parte Des Moines etc. R. R. Co., 103 U. S. 794, 26 **L. Ed.** 461. See, also, Toland v. Sprague, 12 Pet. (U. S.) 300, 9 **L. Ed.** 1093.

461, and Treadwell v. Seymour (C. C.), 41 Fed. 579, 581. The contrary opinion in Guillou v. Fontain, 32 Leg. Int. 362, 11 Fed. Cas. 108, No. 5861, is contrary to the great weight of authority, and does not, in my opinion, rightly interpret the provisions of the statute. Such ancillary attachment, when otherwise authorized, may, however, it seems, be issued in connection with the personal process when the defendant is amenable thereto. Toland v. Sprague, *supra*, 12 Pet. at page 329, 9 **L. Ed.** 1093; North v. McDonald, *supra*, 18 Fed. Cas., at page 333.

"Such ancillary attachment of the defendant's property is, however, a purely statutory remedy, in derogation of the common law. 1 Shinn on Attachment, § 8 (g), p. 10; 4 Cyc. 396, and cases cited in note 3; 3 Am. & Eng. Ency. Law (2d ed.), 184. It is entirely unknown to the immemorial practice and usage of courts of equity, either in England or in the United States, and is essentially a legal remedy, which, in the absence of statutory authority, is not available in equity. Drake on Attachments (3d ed.), § 4, a, p. 4; Shinn on Attachments, *supra*, § 7, p. 9; 1 Bouv. Law Dict. (15th ed.), 202; 3 Am. & Eng. Ency. Law (2d ed.), 184, 193; Lackland v. Garesche, 56 Mo. 267, 270; McPherson v. Snowden, 19 Md. 197; People's Bank v. Shryock, 48 Md. 427, 30 **Am. Rep.** 476, 478. And see Courtney v. Pradt (6th Cir.), *supra*, 160 Fed., at page 562, 87 C. C. A. 463; Shiel v. Patrick (2d Cir.), 59 Fed. 992, 993, 8 C. C. A. 440; Black's Law Dict. (2d ed.), 101.

"There is, however, no statutory authority for the issuance of such an attachment in an equity cause in a federal court. Section 915 of the Revised Statutes, adopting in the federal courts the laws of the several states in relation to attachments against the property of defendants, is specifically limited to 'common-law causes'; and section 914 of the Revised Statutes, providing that the practice and procedure in federal courts shall conform to those of the state courts, specifically excludes 'equity causes.' Neither has the supreme court of the United States, in promulgating the rules of equity practice in the district courts, under the authority vested in it by section 917 of the Revised Statutes, provided for such ancillary writs of attachment. Nor is provision made therefor by any rule of this court; although it may well be that this could be done in accordance with the 79th Rule of Equity Practice (198

Fed. xli, 115 C. C. A. xli), and under the various statutory provisions cited in Steam Stone-Cutter Co. v. Sears (C. C.), 9 Fed. 8, 20 Blatchf. 23, and Steam Stone-Cutter Co. v. Jones (C. C.), 13 Fed. 567, 21 Blatchf. 138."

§ 484. Causes of Action in Which Attachments are Authorized Governed by State Law. There are some variations in the several states as to the kind of action in which an attachment will be permitted. The federal courts follow the state laws on this subject.[8]

§ 485. Property Subject to Attachment—State Laws Govern. The state laws govern as to the property subject to attachment,[9] but in the federal courts property of an equitable nature[10] and property in *custodia legis* cannot be attached,[11] except as several levies are allowed.

§ 486. Affidavit for Attachment Should Conform to State Law. The state requirements as to grounds to be stated in the affidavit for attachment by whom to be made, etc., govern such affidavits in the federal courts.[12]

§ 487. Amendment of Affidavit for Attachment.

§ *948, Rev. Stats.* "Any [circuit or] district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure, the party against whom such

8 Seeley v. Missouri, K. & T. R. Co., 39 Fed. 253; Rothschild v. Knight, 184 U. S. 334, 46 **L. Ed.** 573, 22 Sup. Ct. 391.

9 Thompson v. Baker, 141 U. S. 648, 35 **L. Ed.** 889, 12 Sup. Ct. 89; Coulson v. Panhandle Nat. Bank, 54 Fed. 855, 858, 4 C. C. A. 616; Bigelow v. Chatterton, 51 Fed. 614, 2 C. C. A. 402; Richmond v. Brookings, 48 Fed. 241; Montgomery v. McDermott, 103 Fed. 801, 43 C. C. A. 348; Simonds v. Pearce, 31 Fed. 137; Hankinson v. Page, 31 Fed. 185, 24 Blatchf. 422.

10 Shiel v. Patrick, 59 Fed. 992, 8 C. C. A. 440.

11 Corbitt v. Farmers' Bank, 114 Fed. 602; Henry v. Gold Park Min. Co., 15 Fed. 649, 5 McCrary, 70; Clarke v. Shaw, 28 Fed. 356.

12 Johnson v. Johnson, 31 Fed. 700; Société Foncière v. Milliken, 135 U. S. 304, 34 **L. Ed.** 208, 10 Sup. Ct. 823; Glidden v. Whittier, 46 Fed. 437; Bigelow v. Chatterton, 51 Fed. 614, 2 C. C. A. 402.

process issues." (6 Fed. Stats. Ann., 2d ed., title "Judiciary"; 3 U. S. Comp. Stats. 1916, § 1580.)

This section applies to a defective affidavit for attachment.[13]

So, also, with respect to defective affidavit for garnishment though amendment not allowed by state law.[14]

Where state law authorizes amendment under certain conditions, these rights will be given in federal courts.[15]

§ 488. Bond for Attachment. "The plaintiff seeking an attachment in the federal court against the property of the defendant is required to furnish security in the same manner as to amount and the qualification and residence of the sureties that he would have to furnish if he were proceeding in the state court." [16]

The construction of the bond is governed by state laws.[17]

Amendment of the bond is allowed.[18]

Action on bond may be maintained in federal court.[19]

§ 489. The Writ of Attachment—Amendment, § 948, Rev. Stats. (§ 487 above). The form and issuance of the writ should conform to state practice.[20]

Increasing amount will not dissolve attachment.[21]

The power to amend in attachment suits is the same as in other cases.[22]

The court seal may be added under § 948, Rev. Stats.[23]

13 Erstein v. Rothschild, 22 Fed. 61.
14 Booth v. Denike, 65 Fed. 43.
15 Salmon v. Mills, 49 Fed. 333, 1 C. C. A. 278; Fleischner v. Pacific Postal Teleg. Cable Co., 55 Fed. 739; Rothschild v. Knight, 184 U. S. 334, 46 **L. Ed.** 573, 22 Sup. Ct. 391; Fitzpatrick v. Flannagan, 106 U. S. 648, 27 **L. Ed.** 211, 1 Sup. Ct. 369.
16 Singer Mfg. Co. v. Mason, 5 Dill. 488, Fed. Cas. No. 12,903. See, also, Fleitas v. Cockrem, 101 U. S. 301, 25 **L. Ed.** 954; Blue Grass Canning Co. v. Steward, 175 Fed. 537, 541, 99 C. C. A. 159.
17 Fidelity & D. Co. v. L. Bucki & Son Lumber Co., 189 U. S. 135, 47 **L. Ed.** 744, 23 Sup. Ct. 582.
18 Bumberger v. Gerson, 24 Fed. 257.
19 Files v. Davis, 118 Fed. 465.
20 Russia Cement Co. v. Le Page Co., 174 Mass. 349, 55 N. E. 70.
21 Cutler v. Lang, 30 Fed. 173.
22 Tilton v. Cofield, 93 U. S. 167, 23 **L. Ed.** 860.
23 Wolf v. Cook, 40 Fed. 432.

§ 490. Lien of Attachment. The lien created by the levy is governed by state laws.[24]

Personal property is taken into the custody of the marshal.[25]

By § 60, Jud. Code, quoted, § 70, *supra*, and in the Appendix, *post*, it is provided that the lien of an attachment or seizure, etc., shall not be divested by a change of boundaries, but a certified copy filed in the court of the division or district where the property was located after the change would have the effect of an original.

§ 491. Priorities — Several Attachments. The federal and state courts are of co-ordinate authority in administering the state attachment laws. The court under whose authority the first levy is made is entitled to the actual custody and possession of the property.[26] The federal courts are entitled, however, to make a constructive levy on property in the possession of a state officer when the state law authorizes successive levies and a method of settling priorities.[27]

Likewise the state authorities may constructively levy on property in the possession of the marshal, and intervene in proceedings in the federal courts in the same district.[28]

The rights of other creditors will be preserved in the federal courts even if their claims are less than the jurisdictional amount required to sustain a suit, in such courts,[29] and without reference to the citizenship of the parties.[30]

24 Hankinson v. Page, 31 Fed. 184, 24 Blatchf. 422.

25 Adler v. Roth, 5 Fed. 895, 2 McCrary, 445; Coulson v. Panhandle Nat. Bank, 54 Fed. 855–858, 4 C. C. A. 616. See Dudley v. Lamoille Co. Nat. Bank, 14 Fed. 217; Richmond v. Brookings, 48 Fed. 241; People's Sav. Bank & T. Co. v. Batchelder Egg Case Co., 51 Fed. 131–137, 2 C. C. A. 126; Hankinson v. Page, 31 Fed. 184, 24 Blatchf. 422.

26 Adler v. Roth, 5 Fed. 895, 2 McCrary, 445; Bates v. Days, 17 Fed. 167, 5 McCrary, 342.

27 Brooks v. Fry, 45 Fed. 776.

28 Gumbel v. Pitkin, 124 U. S. 131, 31 L. Ed. 374, 8 Sup. Ct. 379; Bates v. Days, 17 Fed. 167, 5 McCrary, 342.

29 Krippendorf v. Hyde, 110 U. S. 284, 28 L. Ed. 145, 4 Sup. Ct. 27; Rice v. Adler-Goldman Co., 71 Fed. 151, 18 C. C. A. 15.

30 Gumbel v. Pitkin, 124 U. S. 132, 31 L. Ed. 374, 8 Sup. Ct. 379; Fountain v. 624 Pieces of Timber, 140 Fed. 381; Hatcher v. Hendrie & B. Mfg. & Supply Co., 133 Fed. 267, 68 C. C. A. 19; Central Trust Co. v. Worcester Cycle Mfg. Co., 128 Fed. 483.

On removal the federal courts will distribute the fund or proceeds of attached property under the state laws.[31]

§ 492. Delivery Bond. The provision of a state law, or the redelivery of attached property to the defendant upon his furnishing a delivery bond, is recognized and followed in the federal courts.[32] Likewise a provision of state law not permitting a delivery bond to release attached money will be recognized in the federal courts.[33]

§ 493. Third-party Claims Follow State Laws. The provision of a state law permitting a third party to claim attached property by affidavit of ownership and furnishing bond will be followed in the federal courts.[34] The raising of the issue of ownership has also been permitted by motion to vacate the attachment.[35]

§ 494. Dissolution of Attachments Under § 933, Rev. Stats.—Conforms to State Laws.

§ *933 Rev. Stats.* "An attachment of property, upon process instituted in any court of the United States, to satisfy such judgment as may be recovered by the plaintiff therein, except in the cases mentioned in the preceding nine sections (in postal suits), shall be dissolved when any contingency occurs by which, according to the laws of the state where said court is held, such attachment would be dissolved upon like process instituted in the courts of said state: *Provided,* That nothing herein contained shall interfere with any priority of the United States in the payment of debts." (1 Fed. Stats. Ann., 2d ed., pp. 485, 486; 3 U. S. Comp. Stats. 1916, § 1559, p. 3110.)

31 Bankers & M. Tel. Co. v. Chicago Carpet Co., 28 Fed. 398.
32 Ebner v. Heid, 125 Fed. 680, 60 C. C. A. 370.
33 United States v. Neely, 154 Fed. 496.
34 Marden v. Starr, 107 Fed. 199; Batavia v. Wallace, 102 Fed. 240, 42 C. C. A. 310; Tennent-Stribling Shoe Co. v. Roper, 128 Fed. 40, 62 C. C. A. 548.
35 United States v. Neeley, 146 Fed. 763.

Under the provision above quoted, the State law was followed requiring a general appearance before entertaining a motion to dissolve the attachment. (Feurer v. Stewart, 82 Fed. 294.)

So, also, a law which provided that the defendants do not waive right to move to discharge of attachment by mere execution of a bond by them for the release of the attached property. (Glidden v. Whittier, 46 Fed. 437.)

But as in other matters of appellate procedure, State laws give way to federal statutes. Thus the time within which writs of error may be sued out to review an order discharging the attachment, the federal law controls. (Logan v. Goodwin, 101 Fed. 654, 41 C. C. A. 573.)

As to effect of state insolvency proceedings as a dissolution of attachment: Mayer v. Cahalin, 5 Sawy. 355, Fed. Cas. No. 9340; Mather v. Nesbit, 13 Fed. 872, 4 McCrary, 505; Neufeld v. Neufeld, 37 Fed. 560, 13 Sawy. 604; Schwartz v. H. B. Claflin Co., 60 Fed. 676, 9 C. C. A. 204; Tua v. Carriere, 117 U. S. 201, 29 **L. Ed.** 855, 6 Sup. Ct. 565.

Effect of pleading insolvency by defendants in an attachment; time of pleading insolvency: Muser v. Kern, 55 Fed. 916.

§ 495. Attachments in Postal Suits.

§ *924, Rev. Stats.*, "In all cases where debts are due from defaulting or delinquent postmasters, contractors, or other officers, agents, or employees of the Postoffice Department, a warrant of attachment may issue against all real and personal property and legal and equitable rights belonging to such officer, agent, or employee, and his sureties, or either of them, in the following cases:

"First. When such officer, agent, or employee, and his sureties, or either of them, is a nonresident of the district where such officer, agent, or employee was appointed, or has departed from such district for the purpose of permanently residing out of the same, or of defrauding the United States, or of avoiding the service of civil process.

"Second. When such officer, agent, or employee, and his sureties, or either of them, has conveyed away, or is about

to convey away his property, or any part thereof, or has removed or is about to remove the same or any part thereof from the district wherein it is situate, with intent to defraud the United States.

"And when any such property has been removed, certified copies of the warrant may be sent to the marshal of the district into which the same has been removed, under which certified copies he may seize said property and convey it to some convenient point within the jurisdiction of the court from which the warrant originally issued. And *alias* warrants may be issued in such cases upon due application, and the validity of the warrant first issued shall continue upon due application, and the validity of the warrant first issued shall continue until the return day thereof." (1 Fed. Stats. Ann., 2d ed., p. 483; 3 U. S. Comp. Stats. 1916, § 1550.)

§ 496. Same—Application for Warrant Under § 925, Rev. Stats.

§ *925, Rev. Stats.* "Application for such warrant of attachment may be made by any district or assistant district attorney, or any other person authorized by the Postmaster General, before the judge, or, in his absence, before the clerk of any court of the United States having original jurisdiction of the cause of action. And such application shall be made upon an affidavit of the applicant, or of some other credible person, stating the existence of either of the grounds of attachment enumerated in the preceding section, and upon production of legal evidence of the debt." (1 Fed. Stats. Ann., 2d ed., p. 484; 3 U. S. Comp. Stats. 1916, § 1551.)

§ 497. Same—Issuing Warrant—Duties of Clerk and Marshal Under § 926, Rev. Stats.

§ *926, Rev. Stats.* "Upon any such application and upon due order of any judge of the court, or, in his absence, without such order, the clerk shall issue a warrant for the attachment of all the property of any kind belonging to the person specified in the affidavit, which warrant shall be executed with all possible dispatch by the marshal, who shall take the property attached, if personal, into his custody, and hold the same

subject to all interlocutory or final orders of the court." (1 Fed. Stats. Ann., 2d ed., p. 484; 3 U. S. Comp. Stats. 1916, § 1552.)

§ 498. Same—Ownership of Property—Trial Under § 927, Rev. Stats.

§ *927, Rev. Stats.* "At any time within twenty days before the return day of such warrant, the party whose property is attached may, on giving notice to the district attorney of his intention, file a plea in abatement, traversing the allegations of the affidavit, or denying the ownership of the property attached to be in the defendants or either of them; in which case the court may, upon application of either party, order an immediate trial by jury of the issues raised by the affidavit and plea; but the parties may, by consent, waive a trial by jury, in which case the court shall decide the issues raised. And any party claiming ownership of the property attached and a specific return thereof shall be confined to the remedy herein afforded, but his right to an action of trespass, or other action for damages, shall not be impaired hereby." (1 Fed. Stats. Ann., 2d ed., p. 484; 3 U. S. Comp. Stats. 1916, § 1553.)

§ 499. Same—Proceeds of Sale—Investment Under § 928, Rev. Stats.

§ *928, Rev. Stats.* "When the property attached is sold on any interlocutory order of the court or is producing any revenue, the money arising from such sale or revenue shall be invested in securities of the United States, under the order of the court, and all accretions shall be held subject to the orders of the same." (1 Fed. Stats. Ann., 2d ed., p. 485; 3 U. S. Comp. Stats. 1916, § 1554.)

§ 500. Same—Publication of Warrant Under § 929, Rev. Stats.

§ *929, Rev. Stats.* "Immediately upon the execution of any such warrant of attachment, the marshal shall cause due publication thereof to be made, in the case of absconding debtors for two months and of nonresidents for four months. The publication shall be made in some newspaper published in

the district where the property is situate, and the details thereof shall be regulated by the order under which the warrant is issued." (1 Fed. Stats. Ann., 2d ed., p. 485; 3 U. S. Comp. Stats. 1916, § 1555.)

§ 501. Same—Garnishees of Delinquents in Postal Suits Under § 930, Rev. Stats.

§ *930, Rev. Stats.* "After the first publication of such notice of attachment as required by law, every person indebted to, or having possession of any property belonging to, the said defendants, or either of them, and having knowledge of such notice, shall account and answer for the amount of such debt and the value of such property; and any disposal or attempt to dispose of any such property, to the injury of the United States, shall be illegal and void. And when the person indebted to, or having possession of the property of, such defendants, or either of them, is known to the district attorney or marshal, such officer shall see that personal notice of the attachment is served upon such person, but the want of such notice shall not invalidate the attachment." (1 Fed. Stats. Ann., 2d ed., p. 485; 3 U. S. Comp. Stats. 1916, § 1556.)

§ 502. Same—Discharge of Warrant on Giving Bond Under § 931, Rev. Stats.

§ *931, Rev. Stats.* "Upon application of the party whose property has been attached, the court, or any judge thereof, may discharge the warrant of attachment as to the property of the applicant, provided such applicant shall execute to the United States a good and sufficient penal bond, in double the value of the property attached, to be approved by a judge of the court, and with condition for the return of said property, or to answer any judgment which may be rendered by the court in the premises." (1 Fed. Stats. Ann., 2d ed., p. 485; 3 U. S. Comp. Stats. 1916, § 1557.)

§ 503. Same—Adoption of State Attachment Laws and Former Practice not Affected by Postal Attachment Laws.

§ *932, Rev. Stats.* "Nothing contained in the preceding eight sections shall be construed to limit or abridge, in any manner, such rights of the United States as have accrued or

been allowed in any district under the former practice of, or the adoption of state laws by, the United States courts." (1 Fed. Stats. Ann., 2d ed., p. 485; 3 U. S. Comp. Stats. 1916, § 1558.)

§ 504. Garnishment—General Statement. Under § 915, Rev. Stats., quoted in § 480 *supra*, garnishment proceedings and the rights and liabilities thereunder as prescribed by state laws may be adopted by the federal courts.[36]

Thus the effect of garnishment (§ 505 below); a notice of garnishment (§ 506 below); the persons and property subject to garnishment (§ 507 below); the raising of the issue by the garnishee (§ 508 below); and the judgment against the garnishee (§ 509 below); all conform to the state practice.

§ 505. Effect of Garnishment. A garnishee may not be placed in any worse condition than he would if defendant were prosecuting the claim against him, but otherwise he takes the place of the judgment debtor in relation to the attaching creditor.[37]

§ 506. Notice of Garnishment. The state law governs the sufficiency of the notice served on the garnishee.[38]

§ 507. Persons and Property Subject to Garnishment. The persons who may be garnished and the kinds of property for which they must answer are governed by state laws.[39]

A debtor under a judgment in a federal court cannot be subjected to garnishment in the state court, as that would cause a conflict of jurisdictions greatly inconvenient.[40]

Debt not due may be garnished.[41]

36 Randolph v. Tandy, 98 Fed. 939, 39 C. C. A. 351; Wile v. Cohn, 63 Fed. 759.

37 Fidelity Trust Co. v. New York Finance Co., 125 Fed. 275, 60 C. C. A. 189; Allen v. Aetna Life Ins. Co., 145 Fed. 881, 7 L. R. A. (N. S.) 958, 76 C. C. A. 265.

38 Logan v. Goodwin, 104 Fed. 490, 43 C. C. A. 658; Wile v. Cohn, 63 Fed. 759.

39 Moscow Hardware Co. v. Colson, 158 Fed. 199; Johnson v. Union Pac. R. Co., 145 Fed. 249.

40 Henry v. Gold Park Min. Co., 15 Fed. 649, 5 McCrary, 70.

41 Smith v. Marker, 154 Fed. 838, 85 C. C. A. 372.

§ 508. Issue by Garnishee. The practice as to raising issues by a garnishee conforms to state practice except as to appeal from judgments against him.[42]

§ 509. Judgments Against Garnishee. The entry of judgment against the garnishee is governed by state laws, and on admission of indebtedness or proof that he is not indebted, the state law giving reasonable attorneys' fees,[43] and also costs,[44] is enforced. Where the state law authorizes the garnishee to deliver up property to the officer, and be relieved without judgment, the law will be followed.[45] Also, where the state law requires a suit, instead of a garnishment process, against the attached debtor, that law will be followed.[46]

§ 510. Garnishees in Suits by the Government Against Corporations.

§ *935, Rev. Stats.* "In any suit by the United States against a corporation for the recovery of money upon a bill, note, or other security, the debtors of the corporation may be summoned as garnishees; and it shall be the duty of any person so summoned to appear in open court and to depose, in writing, to the amount which he was indebted to the said corporation at the time of the service of the summons and at the time of making such deposition; and judgment may be entered in favor of the United States for the sum admitted by such garnishee to be due to the said corporation, in the same manner as if it had been due to the United States: *Provided,* That no judgment shall be entered against any garnishee until after judgment has been rendered against the corporation defendant to the said action, nor until the sum in which the garnishee stands indebted is actually due." (3 Fed. Stats. Ann., 2d ed., p. 417; 3 U. S. Comp. Stats. 1916, § 1561.)

42 Schuler v. Israel, 120 U. S. 506, 30 L. Ed. 707, 7 Sup. Ct. 648.
43 New York Finance Co. v. Potter, 126 Fed. 432.
44 Rome R. Co. v. Richmond etc. Co., 60 Fed. 43.
45 Allen-West Commission Co. v. Grumbles, 129 Fed. 288, 63 C. C. A. 401; Hatcher v. Hendrie etc. Supply Co., 133 Fed. 267, 68 C. C. A. 19.
46 Brandenstein v. Helvetia Swiss Fire Ins. Co., 159 Fed. 589; also Helvetia Swiss Fire Ins. Co. v. Brandenstein, 168 Fed. 1020, 92 C. C. A. 614.

§ 511. Same—Issue Tendered When Garnishee Denies Indebtedness.

§ *936, Rev. Stats.* "When any person summoned as garnishee deposes in open court that he is not, and was not at the time of the service of the summons, indebted to such corporation, an issue may be tendered by the United States upon such demand, and if, upon the trial of that issue, a verdict is rendered against the garnishee, judgment shall be entered in favor of the United States, pursuant to such verdict, with costs of suit." (3 Fed. Stats. Ann., 2d ed., p. 417; 3 U. S. Comp. Stats. 1916, § 1562.)

§ 512. Same—Garnishee in Contempt on Failing to Appear.

§ *937, Rev. Stats.* "If any person summoned as garnishee, as aforesaid, fails to appear at the term of the court to which he is summoned, he shall be subject to attachment for contempt of the court." (3 Fed. Stats. Ann., 2d ed., p. 417; 3 U. S. Comp. Stats. 1916, § 1563.)

§ 513. Claim to Property in Alien Property Custodian—Limitation of Attachment of.

§ *9, Act Oct. 6, 1917, c.* ——. "That any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may, with the assent of the owner of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the alien property

custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the alien property custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the alien property custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the alien property custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated.

"Except as herein provided, the money or other property conveyed, transferred, assigned, delivered or paid to the alien property custodian shall not be liable to lien, attachment, garnishment, trustee, process, or execution, or subject to any order or decree of any court.

"This section shall not apply, however, to money paid to the alien property custodian under section ten hereof." (Pamphlet Supp., Fed. Stats. Ann., No. 12, p. 131; U. S. Comp. Stats. 1916, § 3115¼e; 244 Fed., Adv. Sheets No. 4, p. 450.

CHAPTER 18.

PROCESS LAW ACTIONS.

SEC.

520. In General.
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524. By Whom Process is Served.
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§ 520. In General. Under § 721, Rev. Stats. (*infra*, § 230), the federal courts, in following the laws of the several states, adopt the state statutes of limitations except where otherwise prescribed by federal statutes, and in like manner follow the state law as to what is the beginning of a suit.

The form and body of process follow the state practice under the conformity act § 914, Rev. Stats. (*infra*, § 450), but the signatures, seal and teste are covered by §§ 911, 912, Rev. Stats. (*infra*, § 522), and amendment of process by §§ 948, 954, Rev. Stats. (*infra*, § 523). The sufficiency of process, because relating to jurisdiction, does not conform to state law, but is governed by federal decisions (*infra*, § 525), so also with respect to special appearances (*infra*, § 527). By whom process is served is provided in §§ 787, 788, Rev. Stats. (*infra*, § 524). The method of service, except substituted service which is governed by § 57, Jud. Code (*infra*, § 526) follows the state practice (*infra*, § 525). A suit *in forma pauperis* is authorized under § 3, Act July 20, 1892, chapter 209 (*infra*, § 528).

§ 521. When Suit is Begun. Under § 721, Rev. Stats. (*infra*, § 230) relating to the adoption of state rules of decision, the federal courts follow the state laws of limitation. (Chapter 10, *infra*,

Statutes of Limitations.) So, also, a state ruling that the filing of a petition in a court of the proper jurisdiction is the beginning of the suit has been followed by the federal court.[1] There should be, however, the issuance of process and a *bona fide* effort to serve same.[2]

§ 522. The Forms of Process for the Commencement of Suits, Except as to Signature, Teste and Sealing, Conform to State Practice.[3] Indorsements upon the copy of summons in actions for penalties brought by the United States thus conform.[4] If the federal courts have adopted by rule of court a form of process conforming to the state law, a subsequent change of the state law would have to be adopted to render improper a writ under the old form.[5]

§ *911, Rev. Stats.* "All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the Supreme Court or a circuit court shall bear teste of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence, and those issuing from a district court shall bear teste of the judge, or, when that office is vacant, of the clerk thereof. The seals of said courts shall be provided at the expense of the United States." (6 Fed. Stats. Ann., 2d ed., p. 16; 3 U. S. Comp. Stats. 1916, § 1534.)

§ *912, Rev. Stats.* "All process issued from the courts of the United States shall bear teste from the day of such issue." (6 Fed. Stats. Ann., 2d ed., p. 912; 3 U. S. Comp. Stats. 1916, § 1535.)

1 International Bank & Trust Co. v. Scott, 159 Fed. 60, 86 C. C. A. 248; Goldenberg v. Murphy, 108 U. S. 162, 27 **L. Ed.** 686, 2 Sup. Ct. 388; Re Connaway, 178 U. S. 430, 44 **L. Ed.** 1137, 20 Sup. Ct. 951; Deepwater R. Co. v. Western Pocahontas Coal & Lumber Co., 152 Fed. 824.

2 United States v. American Lumber Co., 80 Fed. 309, 315; Michigan Ins. Bank v. Eldred, 130 U. S. 697, 32 **L. Ed.** 1082, 9 Sup. Ct. 690.

3 Gillum v. Stewart, 112 Fed. 30, 32; Middleton Paper Co. v. Rock River Paper Co., 19 Fed. 252; Brown v. Pond, 5 Fed. 31; Peaslee v. Haberstro, 15 Blatchf. 472, Fed. Cas. No. 10,884.

4 United States v. Rose, 14 Fed. 681; Miller v. Gages, 4 McLean, 436, Fed. Cas. No. 9571.

5 Shepard v. Adams, 168 U. S. 624, 42 **L. Ed.** 604, 18 Sup. Ct 214; Elson v. Waterford, 135 Fed. 247.

A garnishment notice does not come under the requirements of §§ 911 and 912, Rev. Stats., but is governed by § 915, Rev. Stats., and if it conforms under the later section to the state court procedure it will be held valid.[6]

§ 523. Amendment of Process.

§ *948, Rev. Stats.* "Any circuit or district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure, the party against whom such process issues." (6 Fed. Stats. Ann., 2d ed., p. 90; 3 U. S. Comp. Stats. 1916, § 1580.)

§ *954, Rev. Stats.* "No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe." (6 Fed. Stats. Ann., 2d ed. p. 98; 3 U. S. Comp. Stats. 1916, § 1591.)

Illustrations of amendments under the foregoing statutes are as follows: a district court summons bearing teste of chief justice;[7] striking out of a summons and declaration "administrator, etc.," and inserting "executor, etc.";[8] altering date of writs made returnable on Sunday or another wrong day;[9] changing date of sum-

6 Wile v. Cohn, 63 Fed. 759; Middleton Paper Co. v. Rock River Paper Co., 19 Fed. 252.

7 United States v. Turner, 50 Fed. 734.

8 Randolph v. Barrett, 16 Pet. (U. S.) 138, 10 L. Ed. 914.

9 Norton v. City of Dover, 14 Fed. 106; Hampton v. Rouse, 15 Wall. (U. S.) 684, 21 L. Ed. 250; Semmes v. United States, 91 U. S. 21, 23 L. Ed. 193.

mons;[10] changing name of plaintiff in summons to conform to complaint.[11]

Not every defect, however, will be allowed to be amended. A summons not signed nor under seal of court is not amendable,[12] nor a defective indorsement of substantive matter.[13]

The power of amendment conferred by these statutes cannot be diminished, but may be enlarged by state practice if the federal courts adopt the state rule.[14]

§ 524. By Whom Process is Served.

§ *787, Rev. Stats.* "It shall be the duty of the marshal of each district to attend the district [and circuit] courts when sitting therein, and to execute, throughout the district, all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty." (4 Fed. Stats. Ann., 2d ed., p. 764; 2 U. S. Comp. Stats. 1916, § 1311.)

§ *788, Rev. Stats.* "The marshals and their deputies shall have, in each state, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such state may have, by law, in executing the laws thereof." (4 Fed. Stats. Ann., 2d ed., p. 768; 2 U. S. Comp. Stats. 1916, § 1312.)

The marshal is the executive officer of the court, and no other person is authorized to serve process directed to him except himself or his deputy.[15] Where a state law permits original process to be served by a private person, that law cannot be followed in the federal court, but it must be served by the marshal or his deputy.[16] Independently of state laws, the marshals of the United States have power to deputize persons for the service of writs.[17]

10 Gilbert v. South Carolina etc. Exp. Co., 113 Fed. 523.
11 Gulf etc. R. Co. v. James, 48 Fed. 148, 1 C. C. A. 53.
12 Dwight v. Merritt, 4 Fed. 614, 18 Blatchf. 305.
13 Brown v. Pond, 5 Fed. 31.
14 Norton v. City of Dover, 14 Fed. 106.
15 Schwabacker v. Reilly, 2 Dill. 127, 21 Fed. Cas. No. 12,501.
16 Ibid., and see Shepard v. Adams, 168 U. S. 624, 42 L. Ed. 604, 18 Sup. Ct. 214.
17 The Tug E. W. Gorgas, 10 Ben. 460, 8 Fed. Cas. No. 4585.

§ 525. Method of Service of Process. The federal statutes do not designate how service shall be made in suits at law, and accordingly the method of service conforms to state practice under § 914, Rev. Stats. (§ 450, above), except substituted service under § 57. Jud. Code (§ 526, below).[18]

"The laws of the state providing for the service of process of state courts in actions at law furnish the rules for procedure in such case in this (federal) court, so that whatever would be lawful service of process to bring a party into court if the action were in a court of competent jurisdiction under the state government is lawful and sufficient for the purpose of actions commenced in this court."[19]

Substituted service is governed by § 57, Jud. Code, as set out in the succeeding section. The sufficiency of service to give jurisdiction, as in all other jurisdictional matters, does not conform to state laws, but the federal courts determine for themselves.[20]

Service on corporations conforms as a general rule to state laws.[21]

On foreign corporations state laws will generally be followed if the corporation is doing business in the state of the forum.[22]

§ 526. Service by Publication Under § 57, Jud. Code. Service by publication does not come within the above rule. State statutes regulating the manner of bringing in absent defendants by publication are not applicable to the federal courts. The mode provided by § 57, Jud. Code, for acquiring jurisdiction over an absent defendant by publication is exclusive of every other mode,[23] and must be strictly followed.[24] The action must be *in rem* for the statute

18 Toledo Computing S. Co. v. Computing Scale Co., 142 Fed. 919, 74 C. C. A. 89; Amy v. Watertown, 130 U. S. 302, 32 L. Ed. 947, 9 Sup. Ct. 530; Swarts v. Christie Grain and Stock Co., 166 Fed. 338.

19 Van Dresser v. Oregon R. & Nav. Co., 48 Fed. 202.

20 Michigan Trust Co. v. Ferry, 175 Fed. 667, 99 C. C. A. 221; Clark v. Wells, 203 U. S. 164, 51 L. Ed. 138, 27 Sup. Ct. 43.

21 Higham v. Iowa State Travelers Assn., 183 Fed. 845.

22 McCord Lumber Co. v. Doyle, 97 Fed. 22, 38 C. C. A. 34.

23 Bracken v. Union Pac. R. Co., 56 Fed. 447, 5 C. C. A. 548; New York Life Ins. Co. v. Bangs, 103 U. S. 435, 26 L. Ed. 580.

24 Jennings v. Johnson, 148 Fed. 337, 78 C. C. A. 329; King v. Davis, 137 Fed. 198, 207.

to apply.[25] Attachment cannot be made a basis for substituted service in the federal courts (§ 483, *infra*).

§ 57, *Jud. Code* (*Re-enacting* § 8, *Act March 3, 1875, c. 137*). "When in any suit commenced in any district court of the United States to enforce any legal or equitable lien or cloud upon or claim to, or to remove any encumbrance or lien upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same state, such suit may be brought in either district in said state: *Provided, however*, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and

25 Jones v. Gould, 141 Fed. 698; and, also, Jones v. Gould, 149 Fed. 153, 80 C. C. A. 1.

thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law." (36 Stats. 1102; 5 Fed. Stats. Ann., 2d ed., p. 525; 1 U. S. Comp. Stats. 1916, § 1039; Foster's Federal Practice, 5th ed., pp. 185, 599; Simkins' Federal Equity Suit, 3d ed., pp. 48, 49, 102, 103, 237, 336, 337.)

§ 527. Special Appearance. A special appearance is for the sole purpose of attacking the jurisdiction of the court. The federal courts, being courts of limited jurisdiction, encourage special appearances, and will not, therefore, give such an appearance the force and effect of a general appearance though that may be the effect of state laws.[26]

§ 528. Suit in Forma Pauperis.

§ *3, Act July 20, 1892, c. 209.* "The officers of such court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases."[27] (27 Stats. 252; 2 Fed. Stats. Ann., 2d ed., p. 651; 3 U. S. Comp. Stats. 1916, § 1628.)

[26] Southern P. Co. v. Denton, 146 U. S. 208, 36 L. Ed. 945, 13 Sup. Ct. 44.
[27] Boyle v. Great Northern R. Co., 63 Fed. 539; Donovan v. Salem & P. Nav. Co., 134 Fed. 317; Taylor v. Adams Exp. Co., 164 Fed. 616, 90 C. C. A. 526; Columb v. Webster Mfg. Co., 76 Fed. 198; Gallaway v. State Nat. Bank of Ft. Worth, 186 U. S. 177, 46 L. Ed. 1111, 22 Sup. Ct. 811.

CHAPTER 19.

DEFENSIVE PLEADING LAW ACTIONS.

SEC.

540. In General.
541. Time and Order of Pleading Conform to State Laws.
542. Default Judgment.
543. Forms of Pleadings Conform to State Practice.
544. Sufficiency, Scope and Manner of Pleading Conform to State Laws.
545. Equitable Defenses to an Action at Law.
546. Amendment of Pleading.

§ 540. In General. The time for pleading, unless special rules determine otherwise, follows state practice (§ 541, below).

Under § 918, Rev. Stats., the district courts may make rules for entering judgments by default, and under § 961, Rev. Stats., provision is made for judgment by default in suits by the government on bonds. Defaults may, however, follow state practice (§ 542, below).

The form of pleading is that provided by the state law wherein the district lies (§ 543, below).

The sufficiency and scope of the pleading is governed by state laws (§ 544, below).

Equitable defenses to an action at law are now permitted under § 274b, Jud. Code, added by amendment Act March 3, 1915, c. 90 (§ 545, below).

Amendment of pleading is under §§ 918, 954, Rev. Stats., (§§ 542, 546, below).

§ 541. Time and Order of Pleading Conform to State Laws. The state statutes and practice are followed as to the time for pleading.[1]

1 Werthein v. Continental Ry. & T. Co., 11 Fed. 689, 20 Blatchf. 508; Ricard v. New Providence Tp., 5 Fed. 433; Phenix Ins. Co. v. Charleston Bridge Co. 65 Fed. 628, 13 C. C. A. 58.

Under § 914, Rev. Stats., the district courts of the United States are authorized to follow the practice of the courts of the state in regard to the order of pleading, including the manner in which objections may be taken to the jurisdiction and the question as to whether objections to jurisdiction and defenses on the merits should be pleaded successively or together.[2] Thus, the state laws have been followed as to the order of filing pleas in abatement.[3]

§ 542. Default Judgment.

§ *918, Rev. Stats.* " . . . District courts may, from time to time, and in any manner not inconsistent with any law of the United States, . . . make rules and orders directing . . . the entering and making of judgments by default. . . . " (6 Fed. Stats. Ann., 2d ed., p. 77; 3 U. S. Comp. Stats. 1916, § 1544.)

§ *961, Rev. Stats.* "In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or nonperformance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury." (6 Fed. Stats. Ann., 2d ed., p. 117; 3 U. S. Comp. Stats. 1916, § 1599, p. 3205.)

The state statute and practice for setting aside judgment by default has been followed.[4]

If the defendant fails to make an appearance within the time allowed for making an appearance under the state statutes, it would seem that the plaintiff might have a judgment entered by default in conformity therewith, under the rule that state laws govern as to time within which to plead.

2 Southern Pac. Co. v. Denton, 146 U. S. 209, 36 L. Ed. 945, 13 Sup. Ct. 44.

3 Tennis Bros. Co. v. Wetzel & T. R. Co., 140 Fed. 193; Id., 145 Fed. 458, 7 Ann. Cas. 426, 75 C. C. A. 266; Derk P. Yonkerman Co. v. Chas. H. Fuller's Advertising Agency, 135 Fed. 613.

4 Brown v. Philadelphia etc. R. Co., 9 Fed. 183; Republic Ins. Co. v. Williams, 3 Biss. 370, Fed. Cas. No. 11,707.

As to what constitutes a sufficient appearance to save from default, the state laws govern. Thus, in Illinois a motion to quash a service of summons was held to be sufficient appearance,[5] and in Nebraska a motion for security for costs was sufficient to save from default.[6] It would not be safe in California to rely on any such pleadings under the California law requiring the defendant to either demur or answer within the time allowed to plead.

§ 543. Forms of Pleadings Conform to State Practice. The form of defensive pleading is that existing in the state court of the forum, whether by plea, answer, demurrer, or other form of defensive pleading.[7]

Thus a state rule allowing a plea in abatement to the jurisdiction and on the merits to be set up in the answer may be followed in the federal courts.[8]

So, also, the verification of pleadings is governed by state laws for similar cases in the federal courts.[9]

§ 544. Sufficiency, Scope and Manner of Pleading Conform to State Laws. The sufficiency and scope of pleadings in actions at law are matters in which the district courts will conform to the practice of the courts of record of the states in which they are held.[10]

Thus a state law requiring a plea of *res judicata* to be specially pleaded was followed in the federal court,[11] and a state law giving effect to general issue was followed by the federal courts.[12] The right to plead a setoff or counterclaim when not equitable in character will be controlled by the state practice.[13]

5 Wall v. Chesapeake etc. R. Co., 95 Fed. 398, 37 C. C. A. 129.
6 Schofield v. Palmer, 137 Fed. 754.
7 Roberts v. Lewis, 144 U. S. 656, 36 **L. Ed.** 582, 12 Sup. Ct. 781.
8 Draper v. Town of Springport, 21 Blatchf. 240, 15 Fed. 328.
9 St. Louis etc. R. Co. v. Knight, 122 U. S. 96, 30 **L. Ed.** 1083, 7 Sup. Ct. 1132; County of Ralls v. Douglass, 105 U. S. 728, 26 **L. Ed.** 957; Cottier v. Stimson, 9 Sawy. 435, 18 Fed. 689.
10 Glenn v. Sumner, 132 U. S. 156, 33 **L. Ed.** 301, 10 Sup. Ct. 41.
11 Preferred Acc. Ins. Co. v. Barker, 93 Fed. 158, 35 C. C. A. 250.
12 Hodges v. Easton, 106 U. S. 410, 27 **L. Ed.** 170, 1 Sup. Ct. 307; Burley v. German Am. Bank, 111 U. S. 221, 28 **L. Ed.** 407, 4 Sup. Ct. 341.
13 Groton Bridge & Mfg. Co. v. American Bridge Co., 151 Fed. 871, 879.

Questions of law may be raised by motion where state law permits. So, also, state rules as to demurrers are followed in the federal courts.[14] So, also, the state pleading as to the filing of a replication or making an issue without one will be followed in the federal courts.[15]

Amendments, however, are governed by § 954, Rev. Stats., § 523, *infra*).

§ 545. Equitable Defenses to an Action at Law.

§ *274b, Jud. Code, by Amendment Act March 3, 1915, c. 90.* "That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require." (38 Stats. 956; 5 Fed. Stats. Ann., 2d ed., p 1061; 2 U S. Comp. Stats. 1916, § 1251b, p. 2023; United States v. Richardson (4th Cir.), 223 Fed. 1010, 139 C. C. A. 386; Burrough's Adding Machine Co. v. Scandinavian-American Bank (W. D. Wash.), 239 Fed. 179; Illinois Surety Co. v. United States (7th Cir.), 226 Fed. 665, 141 C. C. A. 421.)

Act June 1, 1874, c. 200. "When an occupant of land, having color of title, in good faith has made valuable improvements thereon, and is, in the proper action, found not to be the rightful owner thereof, such occupant shall be entitled in the federal courts to all the rights and remedies, and, upon instituting the proper proceedings, such relief as may be given or secured to him by the statutes of the state or territory where the land lies, although the title of the plaintiff in the action

14 Sommer v. Carbon Hill Coal Co., 89 Fed. 54, 60, 32 C. C. A. 156; Norfolk & P. Traction Co. v. Rephan, 188 Fed. 276, 110 C. C. A. 254.
15 Stratton v. Essex Co. Park Comm., 164 Fed. 901.

may have been granted by the United States after said improvements were so made." (18 Stats. 522; Fed. Stats. Ann., 2d ed., title "Public Lands"; 3 U. S. Comp. Stats. 1916, § 1541.)

§ 546. Amendment of Pleading. Section 918, Rev. Stats., permits the federal courts to make rules relating to "the filing of pleadings, taking of rules, . . . and otherwise regulate their own practice" (§ 542, above); and § 954, Rev. Stats., permits the court to amend defects and want of form "in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe" (§ 523, above). These sections govern the matter of amendment of pleadings in the federal court, except in so far as state rules and practice may be adopted which are not inconsistent with the federal rules.

In many cases amendments of pleadings have been allowed in conformity with state practice, and in many others they have been refused. The matter is entirely within the discretion of the court, and not reviewable except when there has been a gross abuse of discretion.[16]

[16] Lange v. Union P. R. Co., 126 Fed. 338, 340, 62 C. C. A. 48.

CHAPTER 20.

CONTINUANCES AND ADJOURNMENTS.

SEC.
560. Continuances—In General.
561. Continuances on Death of Party.
562. Survival of Action.
563. Continuance of Suit Against Delinquent in Suit for Public Moneys.
564. Continuances of Suits Under Postal Laws.
565. Continuances of Suits on Debentures.
566. Continuances of Suits Under Tariff Laws.

§ 560. Continuances—In General. This matter conforms to state practice under § 914, Rev. Stats., there being no statutory provisions except those set out in the following sections, 561 to 566, inclusive: § 955, Rev. Stats., on death of a party; § 956, Rev. Stats., survival of action; § 957, Rev. Stats., suits against delinquents for public moneys; § 958, Rev. Stats., suits under postal laws; § 959, Rev. Stats., suits on debentures; § 960, Rev. Stats., suits under tariff laws.

If the judge is unable to act, the marshal or clerk may adjourn court under § 12, Jud. Code (Appendix, *post*).

If the office of judge becomes vacant, the clerk may continue pending proceedings under § 22, Jud. Code (Appendix, *post*).

Trials commenced in a district court may be concluded in a new term under § 8, Jud. Code (Appendix, *post*).

§ 561. Continuances on Death of Party.

§ *955, Rev. Stats.* "When either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives, by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly; and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the

case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where the suit is depending, twenty days before hand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party, as aforesaid, shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court." (6 Fed. Stats. Ann., 2d ed., p. 111; 3 U. S. Comp. Stats. 1916, § 1592.)

§ 562. Survival of Action.

§ *956, Rev. Stats.* "If there are two or more plaintiffs or defendants, in a suit where the cause of action survives to the plaintiff or against the surviving defendant, and one or more of them dies, the writ or action shall not be thereby abated; but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant." (6 Fed. Stats. Ann., 2d ed., p. 115; 3 U. S. Comp. Stats. 1916, § 1593.)

§ 563. Continuance of Suit Against Delinquent in Suit for Public Moneys.

§ *957, Rev. Stats.* "When suit is brought by the United States against any revenue officer or other person accountable for public money, who neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant in open court (the United States attorney being present) makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officers of the Treasury, and rejected; specifying in the affidavit each particular claim so rejected, and that he cannot then safely come to trial. If the court, when such oath is made, subscribed, and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted. Such continuance

may also be granted when the suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes a motion to the court, verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, contract, or other paper certified in the affidavit. And no continuance shall be granted except as herein provided." (2 Fed. Stats. Ann., 2d ed., p. 215; 3 U. S. Comp. Stats. 1916, § 1595.)

§ 564. Continuances of Suits Under Postal Laws.

§ *958, Rev. Stats.* "In suits arising under the postal laws the court shall proceed to trial, and render judgment at the return term; but whenever service of process is not made at least twenty days before the return day of such term the defendant is entitled to one continuance, if, on his statement, the court deems it expedient; and if he makes affidavit that he has a claim against the Postoffice Department, which has been submitted to and disallowed by the sixth auditor, specifying such claim in his affidavit, and that he could not be prepared for trial at such term for want of evidence, the court, if satisfied thereof, may grant a continuance until the next term." (6 Fed. Stats. Ann., 2d ed., p. 116; 3 U. S. Comp. Stats. 1916, § 1596.)

§ 565. Continuances of Suits on Debentures.

§ *959, Rev. Stats.* "In all suits for the recovery of money upon debentures issued by the collectors of customs, under any act for the collection of duties, it shall be the duty of the court to grant judgment at the return term, unless the defendant, in open court, exhibits some plea, on oath, by which the court is satisfied that a continuance is necessary to the attainment of justice; in which case, and not otherwise, a continuance until the next term may be granted." (6 Fed. Stats. Ann., 2d ed., p. 116; 3 U. S. Comp. Stats. 1916, § 1597.)

§ 566. Continuances of Suits Under Tariff Laws.

§ *960, Rev. Stats.* "When suit is brought on any bond for the recovery of duties due to the United States, it shall be the duty of the court to grant judgment at the return term, upon

motion, unless the defendant, in open court (the United States attorney being present), makes oath that an error has been committed in the liquidation of the duties demanded upon such bond, specifying the errors alleged to have been committed, and that the same have been notified in writing to the collector of the district before the said return term; whereupon a continuance may be granted until the next term, and no longer, if the court is satisfied that such continuance is necessary for the attainment of justice." (6 Fed. Stats. Ann., 2d ed., p. 116; 3 U. S. Comp. Stats. 1916, § 1598.)

CHAPTER 21.

MISCELLANEOUS INCIDENTAL MATTERS.

SEC.

570. Consolidation of Cases.
571. Discovery—At Law.
572. Motion and Notice to Produce Books or Papers in Civil Suits Under Customs Revenue Laws.
573. Dismissal or Nonsuit.
574. Verification—Oaths—Acknowledgments.

§ 570. Consolidation of Cases.

§ *921, Rev. Stats.* "When causes of a like nature or relative to the same question are pending before a court of the United States, or of any territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so." (6 Fed. Stats. Ann., 2d ed., p. 80; 3 U. S. Comp. Stats. 1916, § 1547.)

§ *920, Rev. Stats.* "Whenever two or more things belonging to the same person are seized for an alleged violation of the revenue laws, the whole must be included in one suit; and if separate actions are prosecuted in such cases, the court shall consolidate them." (6 Fed. Stats. Ann., 2d ed., title "Judi- Comp. Stats. 1916, § 1546.)

§ 571. Discovery—At Law.

§ *724, Rev. Stats.* "In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules or proceedings in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to

comply with such order, the court may, on motion, give judgment against him by default." (3 Fed. Stats. Ann., 2d ed., p. 160; 3 U. S. Comp. Stats. 1916, § 1469.)

§ 572. Motion and Notice to Produce Books or Papers in Civil Suits Under Customs Revenue Laws.

§ 5, *Act June 22, 1874, c. 391.* "That in all suits and proceedings other than criminal, arising under any of the revenue laws of the United States, the attorney representing the government, whenever, in his belief, any business book, invoice, or paper, belonging to or under control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice, or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid." (3 Fed. Stats. Ann., 2d ed., p. 224; 6 U. S. Comp. Stats. 1916, § 5799.)

See, also, other statutes of a somewhat similar nature quoted above in § 354 et seq., in chapter 12 on "Witnesses."

§ 573. Dismissal or Nonsuit. Except in suits lacking a ground of federal jurisdiction, governed by § 37, Jud. Code, set out in § 471, above, the dismissal by plaintiff, and the granting of a nonsuit, conform to state practice, there being no statutory provisions applicable. (Central Transp. Co. v. Pullman Palace Car Co., 139 U. S. 24, 35 **L. Ed.** 55, 11 Sup. Ct. 478.)

Thus under a state law plaintiff in a federal suit was permitted to dismiss, without prejudice, before final submission to the jury, although the judge had stated that he would sustain a motion to direct a verdict for defendant. (Chicago, M. & St. P. Ry. Co. v. Metalstaff, 101 Fed. 769, 41 C. C. A. 669.)

See chapter 55, *post*.

§ 574. Verification—Oaths—Acknowledgments.

§ *1778, Rev. Stats.* "In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any state or territory, or in the District of Columbia, they may hereafter be also taken or made by or before any notary public duly appointed in any state, district, or territory, or any of the commissioners of the circuit courts, and, when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace." (4 Fed. Stats. Ann., 2d ed., p. 772; 4 U. S. Comp. Stats. 1916, § 3259.)

See, also, § 359 above, for other statutory provisions relative to administration of oaths.

CHAPTER 22.

TRIAL—LAW ACTIONS.

SEC.

580. In General.
581. Method of Trial Under § 566, Rev. Stats.
582. Cases to Which Provision not Applicable.
583. Constitutional Jury—Twelve Men.
584. Qualifications and Exemptions—In General.
585. Same—Under Civil Rights Acts.
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588. Jurors—From Where Drawn.
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591. Talesmen for Petit Juries.
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593. Challenges.
594. Trial by Judge.
595. Mode of Proof—Law Actions.
596. The Taking of Exceptions Does not Conform to State Practice.
597. Time for Excepting to Rulings.
598. Conduct of the Trial.
599. Charge to the Jury—Instructions.

§ 580. In General. After the case is at issue, the next step is the production of proof which under § 861, Rev. Stats. (§ 595 below), must be in open court, except as otherwise specially provided.

There may be material testimony of witnesses who cannot be produced in open court, whose testimony should, if possible, be obtained by depositions. The grounds of taking these depositions are set out in §§ 863 and 866, Rev. Stats. The methods of taking such depositions are provided in §§ 863 to 870, Rev. Stats., inclusive, and may be according to state practice under the Act of March 9, 1892, c. 14, 27 Stats. 7. The statutory provisions as to depositions apply alike to law and equity causes, and, therefore, have not been treated separately for each kind of suit. The subject of depositions is treated in chapter 13, above.

Most of the statutory provisions relating to evidence and witnesses in like manner apply alike to law and equity cases, and have been treated under the general headings "Evidence," in chapter 11, above, and "Witnesses," in chapter 12, above.

This chapter deals with the methods of trial, mode of proof, and conduct of the trial in law actions, including the provisions relating to the qualifications and exemptions of jurors, the selection of the jury, venire, talesmen, challenges, etc., and also respecting the charge to the jury.

The jury's verdict, motion for new trial, and bill of exceptions are treated in the following chapter, No. 23.

§ 581. Method of Trial Under § 566, Rev. Stats.

> *Part § 566, Rev. Stats.* "The trial of issues of fact in the district courts, in all causes except in equity and cases of admiralty and maritime jurisdiction and except as otherwise provided in proceedings in bankruptcy, shall be by jury. . . . " (6 Fed. Stats. Ann., 2d ed., p. 121; 3 U. S. Comp. Stats. 1916, § 1583.)

This right to a jury trial is guaranteed in common-law cases by the United States Constitution, as follows:

> *Part 7th Amendment U. S. Constitution.* "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved. . . . " (11 U. S. Comp. Stats. 1916, § 14,401.)

§ 582. Cases to Which Provision not Applicable. This provision in the seventh Amendment refers only to cases at common law where the amount in controversy exceeds twenty dollars.

The clause does not prevent a waiver of trial by jury in common-law cases.[1]

The guaranty of trial by jury refers only to the federal and not the state courts, and is a limitation on the powers of the federal government.[2]

1 Parsons v. Armour, 3 Pet. (U. S.) 413, 425, 7 **L. Ed.** 724.

2 McBride v. Stradley, 103 Ind. 465, 2 N. E. 358; Seeley v. Bridgeport, 53 Conn. 1, 22 Atl. 1017; Livingston v. Moore, 7 Pet. (U. S.) 469, 8 **L. Ed.** 751; Walker v. Sauvinet, 92 U. S. 90, 92, 23 **L. Ed.** 678; Baylis v. Travelers' Ins. Co., 113 U. S. 316, 321, 28 **L. Ed.** 989, 5 Sup. Ct. 494.

It applies to the District of Columbia and to the organized territories which have been brought under the Constitution, and to their legislative and judicial officers as also to a territorial governor, and to tribunals established under a provisional government in territory covered by the Constitution, but not to consular courts.[3]

The constitutional provision does not apply to equity cases,[4] nor to suits in admiralty.[5] Section 566, Rev. Stats., especially excepts those kinds of causes. The constitutional amendment does not apply in suits against the United States in the court of claims.[6]

§ 583. Constitutional Jury — Twelve Men. Trial by jury means a common-law jury of twelve men, in the presence of and under the supervision of a judge, who instructs them as to the law.[7] A territorial law permitting a verdict by any number of jurors less than twelve is invalid.[8]

§ 584. Qualifications and Exemptions—In General.

§ *275, Jud. Code* (*Drawn from* § *800, Rev. Stats.*). "Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications, subject to the

[3] Capital Traction Co. v. Hof, 174 U. S. 1, 43 **L. Ed.** 873, 19 Sup. Ct. 580; Walker v. New Mexico etc. R. R. Co., 165 U. S. 593, 595, 41 **L. Ed.** 837, 17 Sup. Ct. 421; Thompson v. Utah, 170 U. S. 343, 349, 42 **L. Ed.** 1061, 18 Sup. Ct. 620; Whallon v. Bancroft, 4 Minn. 109 (Gil. 70); Claim of Reside, 9 Opinions of Atty. Gen. 200; Scott v. Billgerry, 40 Miss. 119; Ross v. McIntyre, 140 U. S. 453, 454, 35 **L. Ed.** 581, 11 Sup. Ct. 897.

[4] Barton v. Barbour, 104 U. S. 126, 133, 26 **L. Ed.** 672, 676; Woodworth v. Rogers, 3 Woodb. & M. 135, Fed. Cas. No. 18,018, 2 Robb. Pat. Cas. 625; Buford v. Holley, 28 Fed. 680; Scott v. Billgerry, 40 Miss. 119; Motte v. Bennett, 2 Fish. Pat. Cas. 642, Fed. Cas. No. 9884.

[5] The Huntress, 2 Ware (Dav.), 82, 89, Fed. Cas. No. 6914; Bains v. The James and Catherine, Bald. W. 544, Fed. Cas. No. 756; United States v. La Vengeance, 3 Dall. (U. S.) 297, 1 **L. Ed.** 610.

[6] McElrath v. United States, 102 U. S. 426, 440, 26 **L. Ed.** 189, 192; Torrey v. United States, 42 Fed. 207.

[7] Maxwell v. Dow, 176 U. S. 581, 586, 44 **L. Ed.** 599, 20 Sup. Ct. 448, 494; Thompson v. Utah, 170 U. S. 343, 42 **L. Ed.** 1061, 18 Sup. Ct. 620.

[8] American Pub. Co. v. Fisher, 166 U. S. 464, 467, 41 **L. Ed.** 1079, 17 Sup. Ct. 618; Springville City v. Thomas, 166 U. S. 707, 708, 41 **L. Ed.** 1172, 17 Sup. Ct. 717; Kleinschmidt v. Dunphy, 1 Mont. 118; Hawaii v. Mankichi, 190 U. S. 197, 47 **L. Ed.** 1016, 23 Sup. Ct. 787.

provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned." (36 Stats. 1164; 5 Fed. Stats. Ann., 2d ed., p. 1063; 2 U. S. Comp. Stats. 1916, § 1252.)

§ 585. Same—Under Civil Rights Acts.

§ *278, Jud. Code* (*Re-enacting proviso, § 2, Act June 30, 1879, c. 52*). "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for services as grand or petit juror in any court of the United States on account of race, color, or previous condition of servitude." (36 Stats. 1165; 5 Fed. Stats. Ann., 2d ed., p. 1071; 2 U. S. Comp. Stats. 1916, § 1255.)

§ 586. Same—Penalty for Exclusion.

Part § 4, Act March 1, 1875, c. 114. "Any officer or other person charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen, for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars." (18 Stats. 336; 2 Fed. Stats. Ann., 2d ed., p. 143; 4 U. S. Comp. Stats. 1916, § 3929.)

§ 587. Exempt After Serving Term in a Year.

§ *286, Jud. Code* (*Drawn from § 812, Rev. Stats.*). "No person shall serve as a petit juror in any district court more than one term in a year; and it shall be sufficient cause of challenge to any juror called to be sworn in any case that he has been summoned and attended said court as a juror at any term of said court held within one year prior to the time of such challenge." (36 Stats. 1166; 5 Fed. Stats. Ann., 2d ed., p. 1077; 2 U. S. Comp. Stats. 1916, § 1263.)

§ 588. Jurors—From Where Drawn.

§ *277, Jud. Code* (*Re-enacting § 802, Rev. Stats.*). "Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable

to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service." (36 Stats. 1164; 5 Fed. Stats. Ann., 2d ed., p. 1070; 2 U. S. Comp. Stats. 1916, § 1254.)

§ 589. Impaneling Jurors.

§ *276, Jud. Code* (*Re-enacting Part* § *2, Act June 30, 1879, c. 52*). "All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in district having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein." (36 Stats. 1164; 5 Fed. Stats. Ann., 2d ed., p. 1066; 2 U. S. Comp. Stats. 1916, § 1253; Foster's Federal Practice, 5th ed., pp. 1471, 2378.)

§ 590. Venire—Issuance and Return.

§ *279, Jud. Code* (*Part re-enacts* § *803, Rev. Stats.*). "Writs of *venire facias,* when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or, in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ. Any person named in such writ who resides elsewhere than at the place at which the court is held, shall be served by the marshal mailing a copy thereof to such person commanding him to attend as a juror at a time and place designated therein, which copy shall be registered and deposited in the postoffice addressed to such person at his usual

postoffice address. And the receipt of the person so addressed for such registered copy shall be regarded as personal service of such writ upon such person, and no mileage shall be allowed for the service of such person. The postage and registry fee shall be paid by the marshal and allowed him in the settlement of his accounts." (36 Stats. 1165; 5 Fed. Stats. Ann., 2d ed., p. 1072; 2 U. S. Comp. Stats. 1916, § 1256; Foster's Federal Practice, 5th ed., p. 1697.)

§ 591. Talesmen for Petit Juries.

§ *280, Jud. Code* (*Re-enacting* § *804, Rev. Stats.*). "When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section." (36 Stats. 1165; 5 Fed. Stats. Ann., 2d ed., p. 1073; 2 U. S. Comp. Stats. 1916, § 1257.)

§ 592. Special Juries.

§ *281, Jud. Code* (*Re-enacting* § *805, Rev. Stats.*). "When special juries are ordered in any district court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several states." (36 Stats. 1167; 5 Fed. Stats. Ann., 2d ed., p. 1074; 2 U. S. Comp. Stats. 1916, § 1258.)

§ 593. Challenges.

Part § *287, Jud. Code* (*Drawn from* § *819, Rev. Stats.*). " . . . and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid

of triers." (36 Stats. 1166; 5 Fed. Stats. Ann., 2d ed., p. 1078; 2 U. S. Comp. Stats. 1916, § 1264.)

§ 594. Trial by Judge. Although §§ 649 and 700, Rev. Stats., specifically refer to trials by the circuit courts, and have been held to apply only to the circuit courts, and not to the district courts, nevertheless the new Judicial Code specifically provides for imposing the powers and duties of the circuit courts upon the district courts, thus allowing a waiver of jury trial and a trial by the judge. His findings of fact would be equivalent to a verdict of a jury under §§ 649, 700, 1011, Rev. Stats. (Porter v. F. M. Davies & Co. (8th Cir.), 223 Fed. 465, 467, 140 C. C. A. 11.)

§ *291, Jud. Code (New).* "Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts." (36 Stats. 1167; 5 Fed. Stats. Ann., 2d ed., p. 1083; 2 U. S. Comp. Stats. 1916, § 1268; Foster's Federal Practice, 5th ed., p. 1559; Ex parte United States, 226 U. S. 420, 57 L. Ed. 281; 33 Sup. Ct. 170.)

§ *649, Rev. Stats.* "Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." (6 Fed. Stats. Ann., 2d ed., p. 130; 3 U. S. Comp. Stats. 1916, § 1587.)

§ *700, Rev. Stats.* "When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment." (6 Fed. Stats. Ann., 2d ed., p. 205; 3 U. S. Comp. Stats. 1916, § 1668, p. 3350.)

§ 595. Mode of Proof—Law Actions.

§ *861, Rev. Stats.* "The mode of proof in the trial of actions at common law shall be by oral testimony and by examination of witnesses in open court, except as hereinafter provided." (3 Fed. Stats. Ann., 2d ed., p. 168; 3 U. S. Comp. Stats. 1916, § 1468.)

The statute above quoted governs the practice of procuring testimony to be used in the courts of the United States, and excludes anything in the state practice to the contrary.[9]

Open court is in the presence of the court and jury at the trial.[10]

The exceptions mentioned are provisions respecting depositions, and letters rogatory set out in chapter 13, above, transcripts and copies of official records and other documentary evidence set out in chapter 11, above.

§ 596. The Taking of Exceptions Does not Conform to State Practice. Appellate procedure in federal courts necessarily must be governed by their own rules, as this is a matter which has to do with the organization of the judicial system.

Section 953, Rev. Stats., is the only statutory provision as to preserving exceptions[11] except that § 700, Rev. Stats., providing for trial of cases without the intervention of a jury, provides that "the ruling of the court in the progress of the trial of the cause if excepted at the time, and duly presented by a bill of exceptions, may be reviewed," etc.

In this last-mentioned section the federal courts act independently of state statutes or state practice.[12] Even an agreement of the parties cannot authorize the federal court to depart from the federal rules in this respect.[13]

9 Ex parte Fisk, 113 U. S. 713, 28 **L. Ed.** 1117, 5 Sup. Ct. 724; Union Pacific Ry. Co. v. Botsford, 141 U. S. 250, 35 **L. Ed.** 734, 11 Sup. Ct. 1000.

10 Beardsley v. Littell, 14 Blatchf. 102, Fed. Cas. No. 1185.

11 In re Chateaugay Ore etc. Co., 128 U. S. 544, 32 **L. Ed.** 508, 9 Sup. Ct. 150; Duncan v. Landis, 106 Fed. 839, 844, 45 C. C. A. 666.

12 United States v. King, 7 How. (U. S.) 833, 12 **L. Ed.** 934; Shipman v. Ohio Coal Exch., 70 Fed. 652, 17 C. C. A. 313.

13 Richmond v. Smith, 15 Wall. (U. S.) 429, 21 **L. Ed.** 200; Kelsey v. Forsyth, 21 How. (U. S.) 85, 16 **L. Ed.** 32.

§ 597. Time for Excepting to Rulings. Section 953, Rev. Stats., does not limit the time within which exceptions shall be filed or allowed,[14] nor the time to make, file, and serve a bill of exceptions.[15]

Under § 700, Rev. Stats., the ruling must be "excepted to at the time." It must show from the record that the party objected at the trial to the rulings and wished the exceptions noted and reduced to a bill, and that the party persisted in them.[16] The time for presentation and allowance of the bill of exceptions may be extended in the discretion of the court.[17]

§ 598. Conduct of the Trial. The conduct of the trial is a matter of personal administration by the judge, and does not, therefore, conform to the state laws or rules on that subject.

Thus, the "scintilla of evidence rule" does not apply,[18] but the judge, with due deference to the province of the jury to pass upon the weight and credibility of the evidence,[19] may withdraw the case from the jury and instruct a verdict.[20]

Likewise the judge, in his discretion, may permit the jury to separate after the charge is given,[21] or refuse to ask a special verdict authorized by state law,[22] or may comment on the evidence though forbidden by state law.[23]

§ 599. Charge to the Jury—Instructions. The charge to the jury is within the judge's personal administration of the case.

As stated in the preceding section, he may comment on the evidence and express an opinion as to the facts, provided he sepa-

14 New York etc. R. Co. v. Hyde, 56 Fed. 188, 5 C. C. A. 461.
15 Talbot v. Press Pub. Co., 80 Fed. 567.
16 United States v. Jarvis, 3 Woodb. & M. 217, 26 Fed. Cas. No. 15,469.
17 Dalton v. Hazelet, 182 Fed. 561, 105 C. C. A. 99.
18 Ozanne v. Illinois C. R. Co., 151 Fed. 900.
19 Wichita R. & L. Co. v. Dulaney, 159 Fed. 417, 86 C. C. A. 397; Newburger Cotton Co. v. York Cotton Mills, 152 Fed. 398, 81 C. C. A. 524.
20 Teis v. Smuggler Min. Co., 158 Fed. 261, 15 **L. R. A. (N. S.)** 893, 85 C. C. A. 478; McGuire v. Blount, 199 U. S. 142, 50 **L. Ed.** 125, 26 Sup. Ct. 1.
21 Liverpool etc. Ins. Co. v. N. & M. Friedman Co., 133 Fed. 713, 66 C. C. A. 543; Nudd v. Burrows, 91 U. S. 426, 23 **L. Ed.** 286.
22 United States Mutual Acc. Assn. v. Barry, 131 U. S. 100, 33 **L. Ed.** 60, 9 Sup. Ct. 755.
23 Nudd v. Burrows, 91 U. S. 426, 23 **L. Ed.** 286, 290; Lincoln v. Power, 151 U. S. 436, 38 **L. Ed.** 224, 14 Sup. Ct. 387.

rates the law from the facts in his charge, giving the jury to understand that the determination of the facts is their own province.[24]

The refusal to give special charges after argument was begun was held not error under a rule that special charges should be requested before argument.[25]

The instructions need not be in writing even though the state law so requires,[26] nor need the judge permit the instructions to be taken by the jury upon retiring if that rule be not expressly adopted from the state practice.[27]

[24] Union Pac. R. Co. v. Thomas, 152 Fed. 365, 371, 81 C. C. A. 491.
[25] Atchison T. & S. F. Ry. Co. v. Hamble, 177 Fed. 644, 101 C. C. A. 270.
[26] Lincoln v. Power, 151 U. S. 436, 38 L. Ed. 224, 14 Sup. Ct. 387.
[27] Nudd v. Burrows, 91 U. S. 426, 441, 23 L. Ed. 286; Western Union Tel. Co. v. Burgess, 108 Fed. 26, 47 C. C. A. 168.

CHAPTER 23.

VERDICT—MOTION FOR NEW TRIAL—BILL OF EXCEPTIONS.

SEC.

610. Special Verdict.
611. Form and Effect of General Verdict.
612. Amendment of Verdict.
613. Motion for New Trial.
614. Bill of Exceptions—Authentication, Signing and Contents.

§ 610. Special Verdict. The federal courts are not bound by requirements of state statutes requiring special verdicts on the request of either party.[1]

§ 611. Form and Effect of General Verdict. The form and effect of the verdict under the conformity act, § 914, Rev. Stats., are matters in which the federal courts will follow the state practice.[2]

§ 612. Amendment of Verdict. Under § 954, Rev. Stats., providing for amendment of proceedings, etc., in federal courts, a verdict may be amended to conform to technical requirements.[3]

Amendments should usually be made before the jury separates,[4] but may be so amended during the term by reference to the judge's notes or on other satisfactory evidence.[5]

§ 613. Motion for New Trial.

§ *269, Jud. Code* (*Re-enacting* § *726, Rev. Stats.*). "All the said courts shall have power to grant new trials, in cases where

1 United States Mutual Acc. Assn. v. Barry, 131 U. S. 100, 119, 33 L. Ed. 60, 9 Sup. Ct. 755.
2 Glenn v. Sumner, 132 U. S. 152, 156, 33 L. Ed. 301, 10 Sup. Ct. 41.
3 Gay v. Joplin, 13 Fed. 650, 4 McCrary, 459.
4 Pressed Steel Car Co. v. Steel Car Forge Co., 149 Fed. 182, 79 C. C. A. 130.
5 Miller v. Steele, 153 Fed. 714, 715, 82 C. C. A. 572; Elliott v. Gilmore, 145 Fed. 964, 965.

there has been a trial by jury, for reasons for which new trials have usually been granted in courts of law." (36 Stats. 1163; 5 Fed. Stats. Ann., 2d ed., p. 1047; 2 U. S. Comp. Stats. 1916, § 1246.)

This is a matter of discretion with the trial judge, and not subject to review.[6]

And a motion for a new trial is not necessary for purposes of obtaining a review by the appellate court.[7]

State statutes may add to the power of the court to grant new trials, as in case of allowing two new trials in ejectment suits.[8]

§ 614. Bill of Exceptions—Authentication, Signing and Contents.

§ *953, Rev. Stats.* "That a bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that owing to the fact that he did not

6 Newcomb v. Wood, 97 U. S. 581, 583, 24 **L. Ed.** 1085, 1086.

7 Aaron v. United States, 155 Fed. 833, 84 C. C. A. 67; Boatmen's Bank v. Trower Bros. Co., 181 Fed. 804, 104 C. C. A. 314; Owen v. Giles, 157 Fed. 825, 85 C. C. A. 189.

8 Smale v. Mitchell, 143 U. S. 99, 108, 36 **L. Ed.** 90, 92, 12 Sup. Ct. 353. See, also, Clark v. Sohier, 1 Woodb. & M. 368, 4 Fed. Cas. No. 2835.

preside at the trial, or for any other cause, that he cannot fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor." (6 Fed. Stats. Ann., 2d ed., p. 93; 2 U. S. Comp. Stats. 1916, § 1590.)

The contents of the bill of exceptions are set out in Rule 10 of the circuit courts of appeal (Appendix, *post*), and Rule 4 of the supreme court (Appendix, *post*), of which paragraph 1 is the same as in Rule 10, first, seventh, eighth and ninth circuits, and paragraph 2 the same as paragraph 2, Rule 10, fourth circuit.

postoffice address. And the receipt of the person so addressed for such registered copy shall be regarded as personal service of such writ upon such person, and no mileage shall be allowed for the service of such person. The postage and registry fee shall be paid by the marshal and allowed him in the settlement of his accounts." (36 Stats. 1165; 5 Fed. Stats. Ann., 2d ed., p. 1072; 2 U. S. Comp. Stats. 1916, § 1256; Foster's Federal Practice, 5th ed., p. 1697.)

§ 591. Talesmen for Petit Juries.

§ *280, Jud. Code* (*Re-enacting* § *804, Rev. Stats.*). "When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section." (36 Stats. 1165; 5 Fed. Stats. Ann., 2d ed., p. 1073; 2 U. S. Comp. Stats. 1916, § 1257.)

§ 592. Special Juries.

§ *281, Jud. Code* (*Re-enacting* § *805, Rev. Stats.*). "When special juries are ordered in any district court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several states." (36 Stats. 1167; 5 Fed. Stats. Ann., 2d ed., p. 1074; 2 U. S. Comp. Stats. 1916, § 1258.)

§ 593. Challenges.

Part § *287, Jud. Code* (*Drawn from* § *819, Rev. Stats.*). " . . . and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid

of triers." (36 Stats. 1166; 5 Fed. Stats. Ann., 2d ed., p. 1078; 2 U. S. Comp. Stats. 1916, § 1264.)

§ 594. Trial by Judge. Although §§ 649 and 700, Rev. Stats., specifically refer to trials by the circuit courts, and have been held to apply only to the circuit courts, and not to the district courts, nevertheless the new Judicial Code specifically provides for imposing the powers and duties of the circuit courts upon the district courts, thus allowing a waiver of jury trial and a trial by the judge. His findings of fact would be equivalent to a verdict of a jury under §§ 649, 700, 1011, Rev. Stats. (Porter v. F. M. Davies & Co. (8th Cir.), 223 Fed. 465, 467, 140 C. C. A. 11.)

§ *291, Jud. Code (New).* "Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts." (36 Stats. 1167; 5 Fed. Stats. Ann., 2d ed., p. 1083; 2 U. S. Comp. Stats. 1916, § 1268; Foster's Federal Practice, 5th ed., p. 1559; Ex parte United States, 226 U. S. 420, 57 **L. Ed.** 281; 33 Sup. Ct. 170.)

§ *649, Rev. Stats.* "Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." (6 Fed. Stats. Ann., 2d ed., p. 130; 3 U. S. Comp. Stats. 1916, § 1587.)

§ *700, Rev. Stats.* "When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment." (6 Fed. Stats. Ann., 2d ed., p. 205; 3 U. S. Comp. Stats. 1916, § 1668, p. 3350.)

one term or more, there may be stay for one term in the federal court under § 988, Rev. Stats. (§ 634, below).

Executions may run and be executed in any part of a state under § 985, Rev. Stats., and on judgment in favor of the United States may run in every state and territory under § 986, Rev. Stats. (§ 635, below).

State laws regarding abolishment of imprisonment for debt are effective under § 990, Rev. Stats. (§ 636, below), and for the discharge of a person from arrest or imprisonment in civil cases by § 991, Rev. Stats. (§ 637, below).

A poor debtor may be discharged from imprisonment for debt in government suits by the Secretary of the Treasury under § 3471, Rev. Stats. (§ 638, below), or by the President under § 3472, Rev. Stats. (§ 639, below), when the Secretary is not authorized.

The place of sale of real or personal property is governed by §§ 1 and 2, Act March 3, 1893, c. 225 (§ 640, below), and the publication of notice of sale of real estate by § 3 of the same act (§ 641, below). Proceedings for sale of real estate are not interrupted by a vacancy in the marshal's office but are continued by his successor under § 994, Rev. Stats. (§ 642, below).

The government may be a purchaser in execution sales of real estate in government suits under § 3470, Rev. Stats. (§ 643, below).

Appraisal of personal property sold on execution may conform under § 993, Rev. Stats., to state laws (§ 644, below).

§ 622. Judgments at Law Generally Conform to State Practice.

Part § 914, Rev. Stats. "The practice, . . . forms, and modes of proceeding in civil causes . . . shall conform, as near as may be, to the practice, . . . forms, and modes of proceeding existing at the time in like causes in the courts of record of the state within which such . . . district courts are held, any rule of court to the contrary notwithstanding." (6 Fed. Stats. Ann., 2d ed., p. 21; 3 U. S. Comp. Stats. 1916, § 1537, p. 2912.)

Judgments by default generally conform to state statutes though the district courts may provide for same by rule under § 918, Rev. Stats. This subject is treated in § 542, *supra*.

§ 623. Interest on Judgments—Rate, Allowance of, Levy for—Conforms to State Law.

§ *966, Rev. Stats.* "Interest shall be allowed on all judgments in civil causes, recovered in a circuit or district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the state in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such state; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such state." (4 Fed. Stats. Ann., 2d ed., p. 604; 3 U. S. Comp. Stats. 1916, § 1605.)

Interest on Bonds for Duties.

§ *963, Rev. Stats.* "Upon all bonds, on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of six per centum a year, from the time when said bonds became due." (2 Fed. Stats. Ann., 2d ed., p. 1132; 3 U. S. Comp. Stats. 1916, § 1601.)

Interest on Customs Debentures.

§ *965, Rev. Stats.* "In suits upon debentures issued by the collectors of the customs under any act for the collection of duties, interest shall be allowed, at the rate of six per centum per annum, from the time when such debenture became due and payable." (2 Fed. Stats. Ann., 2d ed., p. 1132; 3 U. S. Comp. Stats. 1916, § 1603.)

§ 624. Judgments—Kind of Money Payable in Suits for Duties.

§ *962, Rev. Stats.* "In all suits by the United States for the recovery of duties upon imports, or of penalties for the nonpayment thereof, the judgment shall recite that it is rendered for duties, and such judgment, with interest thereon, and costs, shall be payable in the coin by law receivable for

duties; and the execution issued thereon shall set forth that the recovery is for duties, and shall require the marshal to satisfy the same in the coin by law receivable for duties; and in case of levy upon and sale of the property of the judgment debtor, the marshal shall refuse payment from any purchaser at such sale in any other money than that specified in the execution." (2 Fed. Stats. Ann., 2d ed., p. 1132; 3 U. S. Comp. Stats. 1916, § 1600.)

§ 625. Record of Judgment as Required by State Laws.

Part § 1, Act Aug. 1, 1888, c. 729. " . . . That whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the state of Louisiana before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state." (25 Stats. 357; 4 Fed. Stats. Ann., 2d ed., p. 608; 3 U. S. Comp. Stats. 1916, § 1606.)

Section 3, Act August 1, 1888, chapter 729, obviating the necessity of filing a transcript of a judgment in the state office of the county where the clerk of the United States has a permanent office, is repealed by Act August 17, 1912, c. 300, 37 Stats. 311; 3 U. S. Comp. Stats. 1916, p. 3211.

§ 626. Indices of Judgment Records.

§ 2, Act Aug. 1, 1888, c. 729. "That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public." (25 Stats. 357; 4 Fed. Stats. Ann., 2d ed., p. 609; 3 U. S. Comp. Stats. 1916, § 1607.)

§ 627. Lien of Judgment—Manner and Extent—Conform to State Laws.

Part § 1, Act Aug. 1, 1888, c. 729. "That judgments and decrees rendered in a circuit or district court of the United States within any state shall be liens on property throughout such state, in the same manner, and to the same extent, and under the same conditions only, as if such judgments and decrees had been rendered by a court of general jurisdiction of such state: . . . " (25 Stats. 357; 4 Fed. Stats. Ann., 2d ed., p. 608; 3 U. S. Comp. Stats. 1916, § 1606.)

§ 967, Rev. Stats. "Judgments and decrees rendered in a circuit or district court, within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such state cease, by law, to be liens thereon." (4 Fed. Stats. Ann., 2d ed., p. 606; 3 U. S. Comp. Stats. 1016, § 1608.)

§ 628. Lien of Judgment or Execution not Divested by Creation of a New District or Division, nor by the Division or Transfer of Territory. By § 60, Jud. Code, quoted in § 70, *supra*, and in the Appendix, it is provided that the lien of a judgment or execution, etc., shall not be divested by a change of boundaries of any territory, and that a certified copy thereof may be filed in the proper court of the division or district in which the property is located after such transfer, and have the same effect as an original.

§ 629. Amendments of Judgment.

Part § 954, Rev. Stats. "No . . . judgment . . . in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form, . . . and such court shall amend every such defect and want of form . . . upon such conditions as it shall, in its discretion and by its rules, prescribe." (6 Fed. Stats. Ann., 2d ed., title "Judiciary"; 3 U. S. Comp. Stats. 1916, § 1591.)

This section does not permit amendments in judgments except as to defects or want of form.[1]

[1] Albers v. Whitney, 1 Story, 310, 1 Fed. Cas. No. 137.

The judgment may be amended, modified, or set aside during the term of entry.[2]

§ 630. Vacation of Judgment Governed by Federal Decisions. The inherent power to vacate a judgment during the term in which it is entered is settled beyond controversy.[3] But a judgment cannot be changed or substantially modified after the term has expired regardless of state law or practice.[4] There may, however, be an independent equity suit to relieve of a judgment at law where there is fraud or other equitable grounds.[5]

§ 631. Executions in Common-law Causes Conform to State Statutes by Rule of Court.

> § *916, Rev. Stats.* "The party recovering a judgment in any common-law cause in any circuit or district court shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise." (3 Fed. Stats. Ann., 2d ed., p. 229; 3 U. S. Comp. Stats. 1916, § 1540.)

"When parties seek attachments, garnishments, executions, provisional remedies of various kinds, in the courts of the United States, it is not the habit of counsel or of the court to search the statutes of a quarter of a century ago, and to conform the proceedings of the federal courts to those then in force in the courts of the several states, but they adopt and use remedies prescribed by their state statutes in force at the time they act. A general and uniform practice becomes a general and established rule of the court, and in the absence of convincing evidence to the con-

2 Southern Pac. R. Co. v. Kelley, 187 Fed. 937, 939, 109 C. C. A. 659.
3 Ibid.
4 Bronson v. Schulten, 104 U. S. 410, 26 **L. Ed.** 797.
5 Johnson v. Waters, 111 U. S. 640, 667, 28 **L. Ed.** 547, 556, 4 Sup. Ct. 619.

trary the presumption in the appellate court is that the remedial statutes in force in the states at the time when proceedings under them were taken in the federal courts had been adopted by those courts, either by written rule or by general practice."[6]

§ 632. Executions not to Issue Against Revenue Officers for Moneys Paid into Treasury on Probable Cause.

§ *989, Rev. Stats.* "When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury." (3 Fed. Stats. Ann., 2d ed., p. 232; 3 U. S. Comp. Stats. 1916, § 1635.)

§ 633. Execution—Stay Pending Motion for New Trial—Vacation of Judgment by Granting New Trial.

§ *987, Rev. Stats.* "When a circuit court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. If such petition is filed within said term of forty-two days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall, of course, be further stayed to the next session of said court. If a new trial be granted, the former judgment shall be thereby rendered void." (3 Fed. Stats. Ann., 2d ed., p. 230; 3 U. S. Comp. Stats. 1916, § 1633.)

[6] Logan v. Goodwin, 104 Fed. 490, 43 C. C. A. 658.

§ 634. Execution—Stay for One Term Where State Law Allows Such Stay.

§ *988, Rev. Stats.* "(When judgment debtor entitled to a continuance of one term.) In any state where judgments are liens upon the property of the defendant, and where, by the laws of such state, defendants are entitled, in the courts thereof, to a stay of execution for one term or more, defendants in actions in courts of the United States, held therein, shall be entitled to a stay of execution for one term." (3 Fed. Stats. Ann., 2d ed., p. 231; 3 U. S. Comp. Stats. 1916, § 1634.)

§ 635. Executions may Run and be Executed in Any Part of a State, and on Behalf of the United States in Any Other State or Territory.

§ *985, Rev. Stats.* "All writs of execution upon judgments or decrees obtained in a circuit or district court, in any state which is divided into two or more districts, may run and be executed in any part of such state; but shall be issued from, and made returnable to, the court wherein the judgment was obtained." (3 Fed. Stats. Ann., 2d ed., p. 229; 3 U. S. Comp. Stats. 1916, § 1631.)

§ *986, Rev. Stats.* "All writs of execution upon judgments obtained for the use of the United States, in any court thereof, in one state, may run and be executed in any other state, or in any territory, but shall be issued from, and made returnable to, the court wherein the judgment was obtained." (3 Fed. Stats. Ann., 2d ed., p. 230; 3 U. S. Comp. Stats. 1916, § 1632.)

§ 636. Execution—Imprisonment for Debt—Modifications of State Law Adopted.

§ *990, Rev. Stats.* "No person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished. And all modifications, conditions, and restrictions, upon imprisonment for debt, provided by the laws of any state, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted

therein as may be adopted in the courts of such state." (3 Fed. Stats. Ann., 2d ed., p. 234; 3 U. S. Comp. Stats. 1916, § 1636.)

§ 637. Execution—Discharge from Arrest or Imprisonment in Civil Actions Conform to State Laws.

§ *991, Rev. Stats.* "When any person is arrested or imprisoned in any state, on mesne process or execution issued from any court of the United States, in any civil action, he shall be entitled to discharge from such arrest or imprisonment in the same manner as if he were so arrested and imprisoned on like process from the courts of such state. The same oath may be taken, and the same notice thereof shall be required, as may be provided by the laws of such state, and the same course of proceedings shall be adopted as may be adopted in the courts thereof. But all such proceedings shall be had before one of the commissioners of the circuit court for the district where the defendant is so held." (3 Fed. Stats. Ann., 2d ed., p. 237; 3 U. S. Comp. Stats. 1916, § 1637.)

§ 638. Execution — Imprisonment for Debt in Government Suits—Discharge of Poor Debtor Under § 3471, Rev. Stats.

§ *3471, Rev. Stats.* "Any person imprisoned upon execution issuing from any court of the United States, for a debt due to the United States, which he is unable to pay, may, at any time after commitment, make application, in writing, to the Secretary of the Treasury, stating the circumstances of his case and his inability to discharge the debt; and thereupon the Secretary may make, or require to be made, an examination and inquiry into the circumstances of the debtor, by the oath of the debtor, which the Secretary, or any other person by him specially appointed, is authorized to administer, or otherwise, as the Secretary shall deem necessary and expedient, to ascertain the truth; and upon proof made to his satisfaction, that the debtor is unable to pay the debt for which he is imprisoned, and that he has not concealed or made any conveyance of his estate, in trust, for himself, or with an intent to defraud the United States, or to deprive them of their legal priority, the Secretary is authorized to receive from such debtor any deed, assignment, or conveyance of his

real or personal estate, or any collateral security, to the use of the United States. Upon a compliance by the debtor with such terms and conditions as the Secretary may judge reasonable and proper, the Secretary must issue his order, under his hand, to the keeper of the prison, directing him to discharge the debtor from his imprisonment under such execution. The debtor shall not be liable to be imprisoned again for the debt; but the judgment shall remain in force, and may be satisfied out of any estate which may then, or at any time afterward, belong to the debtor. The benefit of this section shall not be extended to any person imprisoned for any fine, forfeiture, or penalty, incurred by a breach of any law of the United States, or for moneys had and received by any officer, agent, or other person, for their use; nor shall its provisions extend to any claim arising under the postal laws." (3 Fed. Stats. Ann., 2d ed., p. 240; 6 U. S. Comp. Stats. 1916, § 6377.)

§ 639. Same—Discharge by President When Secretary of Treasury not Authorized.

§ *3472, Rev. Stats.* "Whenever any person is imprisoned upon execution for a debt due to the United States, which he is unable to pay, and his case is such as does not authorize his discharge by the Secretary of the Treasury, under the preceding section, he may make application to the President, who, upon proof made to his satisfaction that the debtor is unable to pay the debt, and upon a compliance by the debtor with such terms and conditions as the President shall deem proper, may order the discharge of such debtor from his imprisonment. The debtor shall not be liable to be imprisoned again for the same debt; but the judgment shall remain in force, and may be satisfied out of any estate which may then, or at any time afterward, belong to the debtor." (3 Fed. Stats. Ann., 2d ed., p. 241; 6 U. S. Comp. Stats. 1916, § 6378.)

§ 640. Execution—Sale of Real Estate or Personal Property—Place of Sale.

§ *1, Act March 3, 1893, c. 225.* "That all real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the courthouse of the county, parish, or city in which the property, or the

greater part thereof, is located, or upon the premises as the court rendering such order or decree of sale may direct." (27 Stats 751; 3 Fed. Stats. Ann., 2d ed., p. 241; 3 U. S. Comp. Stats. 1916, § 1640.)

Personal property sold same as real estate unless otherwise ordered.

§ *2, Act March 3, 1893, c. 225.* "That all personal property sold under any order or decree of any court of the United States shall be sold as provided in the first section of this act, unless, in the opinion of the court rendering such order or decree, it would be best to sell it in some other manner." (27 Stats. 751; 3 Fed. Stats. Ann., 2d ed., p. 243; 3 U. S. Comp. Stats. 1916, § 1641.)

§ 641. Execution—Sale of Real Estate—Publication of Notice.

§ *3, Act March 3, 1893, c. 225.* "That hereafter no sale of real estate under any order, judgment, or decree of any United States court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale in at least one newspaper printed, regularly issued, and having a general circulation in the county and state where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or state, such notice shall be published in such of the counties where said property is situated, as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court may, in its discretion, direct the publication of the notice of sale herein provided for to be made in such other papers as may seem proper." (27 Stats. 751; 3 Fed. Stats. Ann., 2d ed., p. 243; 3 U. S. Comp. Stats. 1916, § 1642.)

§ 642. Execution—Sale of Real Estate—Marshal's Successor to Continue Proceedings.

§ *994, Rev. Stats.* "When a marshal dies, or is removed from office, or the term of his commission expires, after he has taken in execution, under process from a court of the United States, any lands, tenements, or hereditaments, and before sale or other final disposition thereof, the like pro-

cess shall issue to the succeeding marshal, and the same proceeding shall be had as if such marshal had not died or been removed, or the term of his commission had not expired. And when a marshal dies or is removed from office, or the term of his commission expires, after he has sold any lands, tenements, or hereditaments, under process from the court of the United States, and before a deed for the same is executed by him to the purchaser, such court may, on application by the purchaser, or by the plaintiff at whose suit the sale was made, setting forth the case and the reason why the title was not perfected by said marshal, order the marshal for the time being to perfect the title and execute a deed to the purchaser, upon his paying the purchase money and costs remaining unpaid." (3 Fed. Stats. Ann., 2d ed., p. 239; 3 U. S. Comp. Stats. 1916, § 1643.)

§ 643. Execution—Sale of Real Estate in Government Suits—Purchase by Government.

§ *3470, Rev. Stats.* "At every sale, on execution, at the suit of the United States, of lands or tenements of a debtor, the United States may, by such agent as the Solicitor of the Treasury shall appoint, become the purchaser thereof; but in no case shall the agent bid in behalf of the United States a greater amount than that of the judgments for which such estate may be exposed to sale, and the costs. Whenever such purchase is made, the marshal of the district in which the sale is held shall make all needful conveyances, assignments, or transfers to the United States." (3 Fed. Stats. Ann., 2d ed., p. 239; 6 U. S. Comp. Stats. 1916, § 6376.)

§ 644. Execution — Sale of Personal Property — Appraisal Under § 993, Rev. Stats., in Same Manner as Required by State Law.

§ *993, Rev. Stats.* "(Goods taken on a *fieri facias,* how appraised.) When it is required by the laws of any state that goods taken in execution on a writ of *fieri facias* shall be appraised, before the sale thereof, the appraisers appointed under the authority of the state may appraise goods taken in execution on a *fieri facias* issued out of any court of the United States, in the same manner as if such writ had issued

out of a court of such state. And the marshal, in whose custody such goods may be, shall summon the appraisers, in the same manner as the sheriff is, by the laws of such state, required to summon them; and if the appraisers, being duly summoned, fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisement. When such appraisers attend they shall be entitled to the like fees as in cases of appraisements under the laws of the state." (3 Fed. Stats. Ann., 2d ed., p. 239; 3 U. S. Comp. Stats. 1916, § 1639.)

CHAPTER 25.

A SUIT IN EQUITY—SUMMARY.

SEC.

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§ 660. The Bill (chapter 26, below). After preparing a bill in equity in conformity with Rule 25 (§ 692, below), the same may be filed under Rule 1, providing that the court is always open for such purposes.

§ 661. Precipe and Subpoena (chapter 34, below). Under Rule 12, whenever a bill is filed, and not before, the clerk shall issue the process of subpoena for defendant thereon as of course, on the application of plaintiff. Time for return of subpoena is twenty days from issuance. (Rule 12.)

§ 662. Discovery—Interrogatories by Plaintiff (chapter 43, below). Under Equity Rule 58, the plaintiff, at any time after

filing the bill, and not later than twenty-one days after the joinder at issue, may file written interrogatories for discovery of facts and documents material to the issue.

§ 663. **Depositions Under Order of Court** (chapter 48, below). Rule 47 specifies the time of taking depositions, and makes an exception as follows:

"Unless otherwise ordered by the court or judge for good cause shown." Under this exception it seems that depositions may be taken at any time after filing the bill, even before issue is joined, but ordinarily depositions cannot be taken until after issued is joined. (See § 671, below.)

§ 664. **Return of Subpoena.** Under Equity Rule 12, the subpoena is returnable into the clerk's office twenty days from the issuing thereof.

§ 665. **Time for Defensive Pleading** (chapters 35 and 36 below). Under Equity Rules 12 and 16, unless the time shall be enlarged for cause shown by a judge of the court, defendant must file his answer or other defense to the bill in the clerk's office on or before the twentieth day after service, excluding the day thereof.

§ 666. **Hearing of Motion to Dismiss** (chapter 39, below). Under Equity Rule 29, if the defendant move to dismiss the bill or any part thereof the motion may be set down for hearing by either party upon five days' notice.

§ 667. **Time for Answer After Overruling Motion to Dismiss.** Under Equity Rule 29, if the motion to dismiss be denied, the answer shall be filed within five days thereafter.

§ 668. **Time for Answer to Amended Bill.** Under Equity Rule 32, the defendant shall answer an amendment to the bill

made after answer is filed, within ten days after that on which the amendment or amended bill is filed unless the time is enlarged or otherwise ordered by the judge of the court.

§ 669. Issue — When No Counterclaim or Setoff. Under Equity Rule 31, unless the answer assert a setoff or counterclaim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer. If a setoff or counterclaim be filed, presumably the case is at issue upon filing the reply. (See § 675, below.)

§ 670. Discovery—Interrogatories by Defendant (chapter 43, below). Under Equity Rule 58, the defendant at any time after filing his answer not later than twenty-one days after joinder of issue may file interrogatories in writing for the discovery of facts and documents material to his defense of the cause.

§ 671. Depositions in Special Cases After Filing the Bill Before Issue Joined. Under Rule 54, as a general rule, depositions under Revised Statutes, §§ 863, 865, 866 and 867, are to be taken after cause is at issue, and under Rule 47 depositions are only taken for good and exceptional cause after the cause is at issue, but in Equity Rule 47 an exception is provided as follows:

> " . . . All depositions taken under a statute, or under any such order of court, shall be taken and filed as follows, *unless otherwise ordered by the court or judge for good cause shown;* . . . "

Mention is made of the subject here in order to call attention to this exception permitting depositions to be taken before issue is joined.

§ 672. Counterclaim—Time for Serving Copy on Other Defendants (chapter 45, below). Under Equity Rule 31, if the

counterclaim is one which affects the rights of other defendants, they or their solicitors shall be served with a copy of the same within ten days from filing thereof.

§ 673. **Motion to Strike Out Defense** (chapter 46, below). Under Equity Rule 33, if an answer set up an affirmative defense, setoff, or counterclaim, the plaintiff may, upon five days' notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out.

§ 674. **Time for Reply** (chapter 47, below). If a reply is required to a setoff or counterclaim pleaded in the answer, plaintiff shall reply under Equity Rule 31, within ten days after filing of the answer unless a longer time be allowed by the court or judge. Other defendants should reply ten days after service of a copy of the answer upon them.

§ 675. **Issue When Counterclaim or Setoff is Pleaded.** Unless the answer assert a setoff or counterclaim, the cause shall be deemed at issue upon the filing of the answer, but if the answer include a setoff or counterclaim, presumably the cause would be at issue upon the filing of the reply.

§ 676. **Trial Calendar** (chapter 49, below). After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar under Equity Rule 56.

§ 677. **Depositions After Case on Trial Calendar.** Under Equity Rule 56, no depositions shall be taken after the case is placed upon the trial calendar, except upon some strong reason shown by affidavit disclosing why the testimony of the witness cannot be had orally on the trial, why his deposition has not been before taken, and setting out the testimony which it is expected the witness will give.

made after answer is filed, within ten days after ... passed the amendment or amended bill is filed unless ... counsel larged or otherwise ordered by the judge ...

§ 669. Issue — When No Counter ... save in exception ... se shown by affidavit. Equity Rule 31, unless the answer ... in its discretion claim, no reply shall be required ... the trial calendar court or judge, but the cause ... on application to the filing of the answer. If a ... shall be heard on the sumably the case is at ... below.)

§ 670. Discov ... **Reinstatement of Cases Dropped from Calendar—Time** below). **Un** ... *Under Equity Rule 57*, unless a case dropped from the **filing his** ... *trial calendar is reinstated within the year, the suit shall be dis-* of issue ... *missed without prejudice to a new one.* facts ...

CHAPTER 26.

THE BILL IN EQUITY.

tement.
Between State and Federal Statement of Cause of Action.
Bill in Equity—Equity Rule 25.
Bill.
and Residence of Parties.
Jurisdictional Grounds.
Statement of Ultimate Facts—The Cause of Action.
697. Proper Parties.
698. The Prayer of the Bill.
699. Signing the Bill.
700. Verifying the Bill.

§ 690. General Statement. The initial pleading in a suit in equity is the bill. Its filing and not the issuance of summons is the beginning of the suit in equity. (Waldo v. Wilson (4th Cir.), 231 Fed. 654.)

The bill is analogous to the declaration in an action at law. While in the past the established formality of its structure placed it in a class apart from most modern pleadings, and while from the very nature of our federal practice this is still true to some extent, there is nevertheless manifested in the equity rules that took effect February 1, 1913, a strong tendency toward greater simplicity and expedition of pleading, and toward conformity with the rules of pleading governing the form and structure of the complaint in a civil action, as adopted in the various states under the reform or code procedure.

The supreme court of the United States, by Equity Rule 18, has abrogated technical forms of pleading by providing: "Unless otherwise prescribed by statute or these rules, the technical forms of pleadings in equity are abolished." (3 U. S. Comp. Stats. 1916, § 1536, p. 2502; Foster's Federal Practice, 5th ed., p. 511; Simkins' Federal Equity Suit, 3d ed., p. 36.)

The rules have so simplified the practice that practitioners have hesitated to avail themselves of the advantages of the new procedure. The remarks of the Judge in a recent case[1] are so pertinent that they are quoted below:

"What may be observed with respect to the pleadings in this case may be applied to many cases which have been brought since the adoption of the new equity rules, for it has become apparent that solicitors in equity, and especially solicitors in patent causes, have hesitated to conform to the provisions of those rules.

"Rule 25, which relates to the contents of a bill of complaint, is one which should be recognized by the profession as adapted, not only for the relief of the courts, but for the relief of counsel. . . .

"It is unnecessary in this case to determine whether or not, since the new equity rules, a plaintiff may safely omit the averments of compliance with all conditions precedent to the grant of a patent, but it is well to have in mind as a suggestion . . . that, if the bill avers that the patentee or plaintiff 'is the original and first inventor of a new and useful improvement and invention, . . . which are fully and particularly described in the letters patent hereinafter mentioned, and which had not been known or used before his said invention,' a great deal of verbiage common in the bills in patent causes can be eliminated.

"The general averment that an invention had not been known or used before is certainly not helped by limiting such averment to this country, and then averring that it had not been patented or described in this or any foreign country, that it had not been for more than two years prior to the date of his application described or in public use or on sale in this country, and that it had not been abandoned to the public. The detailed averments thus briefly expressed are altogether not any more forceful than the brief averment hereinabove quoted from the case last cited.

"The prayers of the bill in this case are such as were common prior to the adoption of the equity rules. They include prayers that the defendant be decreed to pay the costs, and

[1] Pittsburgh Water Heater Co. v. Beler Water Heater Co. (W. D. Pa.), 222 Fed. 950–952.

that the court grant a writ of subpoena, and that the defendant be bound to answer, waiving, however, answer under oath.

"The equity rules have sufficient provisions as to costs to justify omission of a prayer for the imposition of costs. With respect to the prayer for a subpoena, Rule 12 provides that the clerk shall issue the same whenever a bill is filed upon application by the plaintiff. No prayer for process is necessary, because it is not issued by an order of the court, but by the clerk, under the rule. The prayer that the defendant be required to answer is not necessary, except under Rule 40, relating to nominal parties, 'unless the plaintiff specially require him to do so by prayer,' for every defendant, other than a nominal party, is required to answer or take some other step, if he would not have a decree against him. The waiver of an answer under oath seems wholly unnecessary, because the equity rules apparently do not require any answer to be made under oath. It cannot be inferred that an answer should be made under oath, when the bill is not required to be verified by the oath of the plaintiff, except where some special relief pending the suit be required. The answer no longer appears to be the expression of the results of searching the conscience of the defendant. The method pointed out in Rule 58 for procuring discovery by means of interrogatories is now the method of searching the conscience of the opposite party. That rule provides that the answers to the interrogatories shall be in writing under oath and signed by the party. It seems, therefore, a proper inference from the provisions of the equity rules with respect to oaths to portions of the record other than the answer, and the omission of the requirement of an oath to an answer, that an answer in equity need not now be made under oath.

"The foregoing observations are more by way of suggestion to the profession than as laying down rules which should govern in the preparation of a bill. The court is not unmindful of the fact that Rule 25 is not an absolute direction of all that a bill should contain, but that it is a statement of what shall be sufficient to sustain a bill. If the matters therein prescribed are contained in the bill, the bill is a good bill, although other matters may be embraced therein. The aim of the rule is brevity and simplicity of allegations in bills, and the profession should lend their aid to such end."

§ 691. Differences Between State and Federal Statement of Cause of Action. A bill in equity differs from the statement of a similar cause of action in the state court in these five main points,—(1) The citizenship and residence of each party must be shown; (2) a ground of federal jurisdiction must be set out; (3) in cases where the amount in controversy is material this must be distinctly averred; (4) a ground of equitable jurisdiction must appear; (5) the bill need not be verified unless special relief, pending the suit, is desired.

The federal courts being courts of limited jurisdiction, a ground of jurisdiction must be made to appear, which, in cases of concurrent jurisdiction with state courts, is either diverse citizenship or a federal question, and in both such cases it must also appear that the amount in controversy, exclusive of interest and costs, must exceed the sum or value of three thousand dollars, unless excepted under § 24, Jud. Code (chapter 8, above).

The citizenship of each party must necessarily be shown where the basis of the court's jurisdiction is diverse citizenship, and, for the sake of uniformity, and as bearing oftentimes on the question of venue, this is also required where the ground of jurisdiction is a federal question. (Venue, chapter 4, above.)

§ 692. Contents of a Bill in Equity—Equity Rule 25.

"*Bill of complaint—Contents.* Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:

"First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party, If any party be under any disability that fact shall be stated.

"Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

"Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.

"Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not

within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.

"Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired, the bill should be verified by the oath of the plaintiff, or some one having knowledge of the facts upon which such relief is asked." (3 U. S. Comp. Stats. 1916, § 1536, p. 2504; Foster's Federal Practice, 5th ed., p. 469 et seq.; Simkins' Federal Equity Suit, 3d ed., p. 268.)

§ 693. Caption of the Bill. Equity Rule 25 makes five specifications for framing a bill in equity "in addition to the usual caption."

The title of the court and the title of the action constitute the "usual caption" mentioned in Rule 25 of the bill, but are not under the rules a part of it so as to cure defects of the statement of the cause of action.

It may be set out in the following manner:

In the District Court of the United States for the District of ——,
—— Division Sitting at ——.

John Doe,
Plaintiff,
v.
Richard Roe,
Defendant.

COMPLAINT IN EQUITY.

§ 694. Citizenship and Residence of Parties. It has always been a requirement of bills in equity in the federal courts that "the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party," should be set out, the purpose being to show jurisdiction when the same depends upon diversity of citizenship and when the ground of jurisdiction is a federal question for the sake of uniformity, and in both cases to protect the parties by enabling them to locate and identify each other with certainty with a view to compelling obedience to any order of the court, and to inform the court as

well as the opposing party of the conditions and disabilities, if any, of the respective parties, and as bearing in many cases on the question of venue.

Following the caption is the statement of the citizenship and residence of each party, as follows:

"John Doe, a citizen of the state of ——, residing in —— County of said state, alleges, as his bill of complaint against Richard Roe, a citizen of the state of —— and residing in —— County, in said state, as follows:

If one or both of the parties is a corporation, it must be designated as such. (Sun Printing & Pub. Assn. v. Edwards, 194 U. S. 377, 48 **L. Ed.** 1027, 24 Sup. Ct. 696.)

"Duly organized and existing under the laws of the state of ——, [designating the state], and with its principal place of business at —— [city and county] and a citizen of said state."

A bill setting forth that plaintiffs were acting "in behalf of such other creditors of and claimants against the defendants or any of them, as may desire relief similar to that prayed for herein and may intervene and become parties thereto," was held to violate the rule in not setting forth the names, citizenship and residence of such parties. (State of Maine Lumber Co. v. Kingfield Co. (Conn.), 218 Fed. 902.)

§ 695. Jurisdictional Grounds. "A short, plain statement of the facts upon which the court's jurisdiction depends" refers to the grounds of federal jurisdiction which must affirmatively appear and must be accurate and explicit, leaving nothing for inference. (Lownsdale v. Gray's Harbor Boom Co., 117 Fed. 983.)

If the jurisdictional ground is diversity of citizenship, the particular state and county of which each party is a citizen must be set forth by name, and it must be alleged that the party is a "citizen," not merely a "resident," or "inhabitant," thereof. (Denny v. Pironi, 141 U. S. 121, 123, 35 **L. Ed.** 657, 11 Sup. Ct. 966.)

In these cases, too, the venue of the action is placed by statute, in the district of the plaintiffs or defendant's residence, and it must therefore be alleged that the suit is brought in the district court of the district of residence. (Miller v. Pennsylvania R. Co., 91 Fed. 298.)

It must be remembered that where the jurisdiction depends on diversity of citizenship the test of jurisdiction is *citizenship*, not *residence*, or *habitation*, and nothing short of an allegation of *citizenship* will suffice.

As to allegations of a federal question, see chapter 6.

So important is the affirmative showing of these jurisdictional facts in the bill, that no appeal will be entertained unless they plainly appear by the record, even though no objection be raised in the court below. An insufficient averment of jurisdictional facts may, however, be amended. (Johnson v. F. C. Austin Mfg. Co., 76 Fed. 616; Carson v. Dunham, 121 U. S. 421, 427, 30 **L. Ed.** 992, 994, 7 Sup. Ct. 1030.)

§ 696. Statement of Ultimate Facts—The Cause of Action. A statement of the cause of action showing the grounds of equitable relief should be a "short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence."

Commenting on this clause the circuit court of appeals (2d Cir.), Crim v. Rice, 232 Fed. 573, says:

> "The purpose of the rule is manifest, and it is unnecessary to insert in a bill extraneous matter, which cannot afford information either to the court or opposing litigants. In this bill, many allegations are either repetitions or are phrased in language foreign to properly drawn pleadings. Thus we find that a defendant was 'the agent, representative, strawman, employee, dummy, tool, and operator of the bankrupt defendants'; that defendants were guilty of 'designing, contriving, and conspiring to swindle, cheat, deceive, hinder, delay, and defraud' creditors; that certain acts were 'devices, fences, screens, and cloaks and legal disguises'; that

one of the defendants 'has been an active participant, director, designor, and operator and conspirator'; that certain banks 'have escaped publicity and criticism by the authorities for their negligence in lending money.' . . .

"If, because of these expressions and the diffuse character of the bill, a motion had been made under Rule 29, for failure to comply with Rule 25, we think the district court would have been justified in granting the motion on that ground."

But since a bill in equity is required to state only the ultimate facts, a court should be cautious not to dismiss a bill for mere lack of fullness of detail in allegation. It is not expected that the bill should set out the evidence to be adduced. (Clinchfield Coal Corp. v. Steinman (4th Cir.), 217 Fed. 875, 133 C. C. A. 585.)

In respect to this clause in the rule, the bill in equity in the federal courts differs little, if any, from the better forms required in the reformed or code procedure.

Ultimate facts. The statement of the plaintiff's case must be composed of allegations of fact only,—not inferences drawn from facts, or mere conclusions of law. The meaning of the phrase "ultimate facts," as used in the rule, is perhaps best explained by the last clause of the third paragraph of the rule itself, to wit, —"omitting any mere statement of evidence." That is to say, ultimate facts are those facts upon which the plaintiff's case directly depends, and which are to be proved by the evidence. A statement of the ultimate facts is a statement of the issues involved,—not of the evidence available to prove the issues.

These ultimate facts should be alleged in positive form, not hypothetically or by way of recital, although it has been held that if the fact appear by necessary implication, the pleading is not defective. (Investor Pub. Co. of Mass. v. Dobinson, 72 Fed. 603.)

Allegations on information and belief are also permitted where the facts are peculiarly within the knowledge of the defendant. (Leavenworth v. Pepper, 32 Fed. 718.)

Thus a bill may properly allege on information and belief, in the alternative, that defendant had actual knowledge or con-

structive notice of an essential fact, where the complainant has no means of knowing the facts as to such knowledge or notice. (Brady v. Reliance Motion Picture Corp. (S. D. N. Y.), 232 Fed. 259.)

The "short and simple statement of ultimate facts" has long been the end in view in drawing bills in equity, but the statement must not be made so short and simple as to omit essential allegations required to make a cause of action.

Infringement of patent. Under previous rules it has been held that a bill in a suit for the infringement of a patent must not only contain an allegation of the due issuance of the patent, but also of all the facts upon which the authority to so issue it depends.

The new rule is silent as to the necessity of these conditions. The matter is discussed above, § 690.

Excusing laches. If it appears from the bill that there has been delay in bringing the suit so that the defense of laches might be interposed, it becomes necessary to anticipate the defense and excuse the delay. The facts constituting the excuse must be clearly and distinctly alleged, to enable the court to determine whether the suit has been prosecuted with due diligence.

Fraud. It is also a well-established rule that facts constituting fraud, accident or mistake must be specifically alleged. Charges of fraud and the like must be clearly proved, and the defendant is entitled to be informed by the bill as to the exact nature of the charges.

Mere adjectives of fraud cannot supply the proper averments. (Rice v. Wilson (Del.), 225 Fed. 159, 163.)

Complete statement. The statement of the plaintiff's case is the most important part of the bill. It must contain all the material allegations upon which the plaintiff relies. It must state the case completely, for the court has no power to grant relief not shown by the statement to be within the issues.

§ 697. Proper Parties. "If there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties,—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction."

Proper parties are those whose interest in the subject matter of the litigation may be conveniently settled by making them parties thereto, but whose presence is not absolutely essential to a final determination of the matter.

Classification of parties. In Shields v. Barrow, 17 How. 130, 15 **L. Ed.** 158, parties are classified as: "(1) Formal parties. (2) Persons having an interest in the controversy and who ought to be made parties, in order that the court may act on that rule which requires it to decide upon and finally determine the entire controversy, and do complete justice by adjusting all the rights involved in it. These persons are commonly termed 'necessary parties,' but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice without affecting other persons not before the court, the latter are not indispensable parties. (3) Parties who not only have an interest in the controversy, but an interest of such nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." (16 Cyc. 190.)

It has long been held, and was formerly a part of old Equity Rule 47, and is now expressly provided by Rule 39, that the court may, in its discretion, determine the suit without the presence of proper parties, so that the purpose of the provision of Rule 25, above quoted, is undoubtedly to place clearly before the court the reason, if any, for the nonjoinder of such parties, in order that the court may exercise its discretion with regard thereto.

§ 698. The Prayer of the Bill. "A statement of, and prayer for any special relief pending the suit, or upon final hearing,

may be stated and sought in alternative forms. If special relief pending the suit be desired, the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which the relief is asked."

The prayer for process is no longer necessary inasmuch as Equity Rule 12 provides that "whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff."

It would also seem that a general prayer for relief is no longer necessary, although the cautious pleader will undoubtedly continue to incorporate it in his bill, there being no express prohibition of its use, and in view of the fact that a general prayer for relief has been held under former rules sufficient to save the complaint from attack by demurrer when the facts were sufficiently alleged, but the pleader had mistaken the special relief to which he was entitled.

> "Whether relief to be given by the court must be confined to that thus asked does not appear from the rule, nor can we learn from the rule itself whether the scope of a plaintiff's action is to be determined by his prayers." (Bernheim v. Louisville Property Co. (N. D. Ky.), 221 Fed. 273, 278.)

But the general prayer for relief cannot give the power to grant relief other than that shown to be due the plaintiff under the facts alleged, and it is undoubtedly better pleading under the new rules to ask for all the relief desired by appropriate special prayers which, as provided in the rules, may be stated and sought in alternative forms. Commenting on the rule the court said:

> "It may be unnecessary to pray specifically for relief against infringement to which the facts pleaded would show a right, but it would be safer for the complainant to amend its bill in this respect, though the bill contains a prayer for general relief." (Nikola Tesla Co. v. Marconi Wireless Tel. Co. (S. D. N. Y.), 227 Fed. 903, 905.)

This provision, authorizing prayers for relief in alternative forms, while it has never before appeared in the rules has been

held to be permissible in former adjudicated cases. (Jones v. Missouri-Edison Electric Co., 144 Fed. 765, 75 C. C. A. 631.)

In Boyd v. New York & H. R. Co. (S. D. N. Y.), 220 Fed. 174, 178, the judge comments as follows:

> "There is one criticism of the bill, mentioned in arguments and briefs, to which preliminary consideration may be given. It is urged that the bill contains two inconsistent 'causes of action.' It does, in my opinion, show inconsistent prayers for relief, because it demands (1) the utter destruction of the lease of 1873, as obnoxious to the Sherman Act, and also (2) the preservation of the present status of Harlem stock, which depends wholly upon the very lease sought to be annulled.
>
> "But it is not thought that such inconsistency is either fatal to the bill, or constitutes a serious blemish thereupon; and for two reasons: First, the prayers of a bill are not parts of the cause of action therein set forth; and, second, inconsistent and even contradictory prayers are permitted by Equity Rule 25, which allows relief to 'be stated and sought in alternative forms.'
>
> "'Alternative' means 'mutually exclusive' (Cent. Dict.), and no phrase could more happily describe the prayers of this bill. 'Cause of action' has not been found easy of definition. But Professor Pomeroy's effort, that it is 'composed of the right of the plaintiff and the obligation, duty or wrong of the defendant; and these combined, it is sufficiently accurate to say, constitute a cause of action,' has been adopted in Veeder v. Baker, 83 N. Y. 156, at page 160; while the shorter statement of Durham v. Spence, L. R. 6 Ex. 46, that it 'is that which produces the necessity for bringing an action' has been approvingly quoted in Shelby Steel Tube Co. v. Burgess Gun Co., 8 App. Div. 444, at page 448, 40 N. Y. Supp. 871, at page 873.
>
> "In the light of these definitions, I find, in plaintiff's 'statement of the ultimate facts upon which' they ask relief, only one cause of action; for their right is single, viz., to preserve their property, the duty of the defendants is to cooperate in such preservation; and the wrong alleged is a threatened trespass upon that right.

"The prayers are but the opinions of the plaintiffs as to the proper method of redress, and inconsistency there is harmless. The court must select that method which is appropriate and lawful, and such procedure as is illustrated by this motion will produce a selection with the minimum expenditure of time and expense."

§ 699. Signing the Bill.

Equity Rule 24. "Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading and is not interposed for delay." (3 U. S. Comp. Stats. 1916, § 1536, p. 2503; Foster's Federal Practice, 5th ed., pp. 561, 683, 713, 753, 772; Simkins' Federal Equity Suit, 3d ed., pp. 134, 286, 349, 401, 425.)

The purpose of the rule is to insure good faith. It does not in any respect vary the relation of counsel and client. It does not make counsel who signs the bill a counsel of record, who cannot be changed except on terms, as in the case with the solicitor of record, nor entitle him to a lien on the decree for his services. His remedy is at law. (Goodwin Film & Camera Co. v. Eastman Kodak Co. (2d Cir.), 222 Fed. 249, 251, 138 C. C. A. 71.)

§ 700. Verifying the Bill. The bill need not be sworn to by the plaintiff, unless it is a stockholder's bill under Rule 27 or unless some special relief such as an injunction or writ of *ne exeat* be desired, pending the suit, in which event it must be verified as required by Rule 25 quoted above.

The bill then becomes in the nature of an affidavit, upon which proceedings for the issuance of the writs granted may be based.

If the bill is required to be verified, it is provided:

Equity Rule 36. "Every pleading which is required to be sworn to by statute or these rules may be verified before any justice or judge of any court of the United States or of

any state or territory, or of the District of Columbia, or any clerk of any court of the United States, or of any territory, or of the District of Columbia, or any notary public." (3 U. S. Comp. Stats. 1916, § 1536, p. 2512; Simkins' Federal Equity Suit, 3d ed., p. 425.)

An affirmation in lieu of oath may be used.

Equity Rule 78. "Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof, make solemn affirmation to the truth of the facts stated by him." (3 U. S. Comp. Stats. 1916, § 1536, p. 2529; Simkins' Federal Equity Suit, 3d ed., p. 425.)

See, also, § 359 above as to administration of oaths.

CHAPTER 27.

PARTIES.

SEC.

710. Real Party in Interest; Necessary Parties; Intervention—Rule 37.
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712. Real Party in Interest—Capacity of Plaintiff to Sue.
713. Persons Having an Interest may Join as Plaintiffs.
714. Party Refusing to Join as Plaintiff may be Made a Defendant.
715. Class Suits—Rule 38.
716. Common Interest a Material Issue.
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718. Where Parties have a Representative Others may not Sue Unless Representative Refuses to Act.
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722. Heir as Party—Suit to Execute Trusts of Will—Rule 41.
723. Joint and Several Demands—Rule 42.
724. Saving Rights of Absent Parties Where Defendant Makes Tardy Objection—Rule 44.

§ 710. Real Party in Interest; Necessary Parties; Intervention.

Equity Rule 37. "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant.

"Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding." (3 U. S. Comp. Stats. 1916, § 1536, p. 2512; Foster's Federal Practice, 5th ed., p. 404, § 110, p. 415, § 113, p. 821, § 258; Simkins' Federal Equity Suit, 3d ed., pp. 225, 229, 252.)

§ 711. Defect of Parties may Cause Dismissal on Court's Own Motion. In American Ball Bearing Co. v. Adams (N. D. Ohio), 222 Fed. 976, 979, it was contended that the question as to the capacity of the plaintiff to maintain the suit could not be raised and decided by the court, because it was not made by the pleadings in the case. The court said: "It is enough to say that this is a suit in equity to which both section 37 of the Judicial Code (quoted above § 215), and rule 37 (quoted above § 710), of the new equity rules of 1912 are applicable, and that under the authority of these, as well as under the general authority of a court to prevent imposition, I have no doubt that it is within the power, and that it is the duty of this court when it believes, as I believe in this case, that a plaintiff is without legal capacity to maintain a suit before it to proceed no further therein, but to dismiss the case. I cannot assent to the conclusion that a court is so bound by rules of practice that it must enter a judgment in favor of or against a corporate name which it believes has no right in court, either as a corporation *de jure* or *de facto*, simply because the parties to the cause may not have made the validity of the corporate powers of the plaintiff an issue by their pleadings."

§ 712. Real Party in Interest—Capacity of Plaintiff to Sue. Rule 37, quoted above § 710, raises no question of legal capacity to sue but is directed to the ground of federal jurisdiction.

In Kardo Co. v. Adams (6th Cir.), 231 Fed. 950, 958, 146 C. C. A. 146, the court said:

"While that part of equity rule 37 taking effect February 1, 1913, providing that 'every action shall be prosecuted in

the name of the real party in interest,' is not found in any previous equity rules made by the Supreme Court for the guidance of courts in equity cases, yet it is but the declaration of a rule in equity in the courts of the United States, which by statute of Ohio and generally in the states which have adopted a code of civil procedure prevails, and which, in cases at law, the courts of the United States follow. It is clear, therefore, that when the nature of the suit is such as to show that it really and substantially involves a controversy within the capacity of the court to determine and grant the relief asked, and no question of citizenship, upon which jurisdiction is based, exists, the case presents no peculiar feature imposing on a court of the United States the duty, on its own motion, without pleadings, of inquiring into the question of the capacity of the plaintiff to sue."

§ 713. Persons Having an Interest may Join as Plaintiffs. The interest referred to in Rule 37, quoted above § 710, is an interest in law. Therefore, an assignee of a copyrighted drama, where moving-picture rights are reserved by the author is not a proper party to an infringement suit against producing a motion-picture play. (Tully v. Triangle Film Corp., 229 Fed. 297.)

§ 714. Party Refusing to Join as Plaintiff may be Made a Defendant. Thus in a suit by trustees of an insolvent to recover assets, where one of the trustees refuses to join as a complainant, he may be made a defendant. His citizenship in such a case is considered as of a plaintiff, so that the fact of his being joined as defendant with a citizen of the same state does not deprive the court of jurisdiction. (Georgia S. & F. Ry. v. Einstein (5th Cir.), 218 Fed. 55, 133 C. C. A. 657.)

§ 715. Class Suits—Rule 38.

Equity Rule 38. "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." (3 U. S. Comp. Stats. 1916, § 1536, p. 2513; Foster's Federal Practice, 5th ed., § 114, p. 423; Simkins' Federal Equity Suit, 3d ed., pp. 228, 237, 238, 239.)

§ 716. Common Interest a Material Issue. Under rule 38, quoted above § 715, when the allegation of a general or common interest to many persons is denied, the duty devolves on the court to determine whether the common or general interest exists before decreeing against those who are alleged to be in court by representation.

A suit against the members of a local labor union would not bring in the general officers of the union unless participants with those served. (Hill v. Eagle Glass & Mfg. Co. (4th Cir.), 219 Fed. 719, 135 C. C. A. 417. See, also, Little v. Tanner, 208 Fed. 605; In re Englehard & Sons Co., 231 U. S. 646, 58 **L. Ed.** 416, 34 Sup. Ct. 258.) A suit by an alien to restrain the enforcement of a state law requiring employers to employ eighty per cent qualified voters or native-born citizens (Arizona, Nov. 3, 1914), was not an action in which plaintiff could sue on behalf of all others similarly situated. (Raich v. Truax (Ariz.), 219 Fed. 273, and cases cited.)

§ 717. Representatives of a Class. Where an order of the Interstate Commerce Commission authorized, and a tariff filed thereunder provided, higher rates to four certain cities than to certain other cities, one of such cities, representing the interest of its citizens, and traffic associations formed for the purpose of representing jobbers and merchants in the three other cities, could maintain a suit to enjoin the enforcement of such order and tariff, as they were within the rule that bills may be filed in the name of unincorporated associations and parties in behalf of others similarly situated, and moreover the equity rules seem to contemplate such a suit for the common benefit of all, where the parties are numerous and have a common or general interest. (Merchants' & Manuf. Traffic Assn. v. United States (N. D. Cal.), 231 Fed. 292. A class suit. Helm v. Zarecor (M. D. Tenn.), 213 Fed. 648.)

A corporation representing its stockholders for whom it has made a contract is a proper party to sue. (Magruder v. Belle

Fourche Valley Water Users Assn. (8th Cir.), 219 Fed. 72, 133 C. C. A. 524.)

§ 718. Where Parties have a Representative Others may not Sue Unless Representative Refuses to Act. Holders of mortgage bonds of a railroad company cannot maintain a suit to enjoin the enforcement of a state statute fixing rates unless it is shown that the mortgage trustee, representing all the bondholders, has refused to bring the suit.

The case is not within federal equity rule 38, for here the mortgage trustee is normally the official representative of the bondholders. The trustees under the consolidated mortgage being properly before the court, it is immaterial whether the individual holders of bonds secured by that mortgage are properly joined with the trustee as parties plaintiff. (Winthrop v. Fellows (Mich.), 230 Fed. 702, 705.)

§ 719. Absence of Persons Who Would be Proper Parties.

Equity Rule 39. "In all cases where it shall appear to the court that persons who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties." (3 U. S. Comp. Stats. 1916, § 1536, p. 2513; Foster's Federal Practice, 5th ed., § 117, p. 431; Simkins' Federal Equity Suit, 3d ed., pp. 225, 227, 231.)

It is the usual rule in the federal courts that, if a case may be finally decided between the parties litigant without bringing others before the court who would, generally speaking, be necessary parties, such parties may be dispensed with if they are citizens of another state. But, if parties not before the court have rights so closely related to the issues between the parties in court that a final decision cannot be made between them with-

out affecting the rights of those not before the court, the court may not dispense with such persons. (Ex parte Equitable Trust Co., 231 Fed. 571, 145 C. C. A. 457.)

§ 720. Absence of Parties—Illustrations. Under § 50, Jud. Code, and Rule 39 (quoted § 719, above) a federal court has jurisdiction of a suit by a packer to require inspectors to inspect and pass a product where the chief inspector in charge at the place of suit is before the court, although department heads, who are made parties, cannot be served. (St. Louis Independent Packing Co. v. Houston (8th Cir.), 215 Fed. 553, 132 C. C. A. 65.)

In a recent case (Lowenthal v. Georgia Coast & P. R. Co., 233 Fed. 1010, at page 1015), the court holding that a trustee was not an indispensable party said:

> "The contention that the bill must be dismissed because the trustee is not made a party defendant is equally unfounded. The trustee is a corporation and a citizen of New York. It is not found in this district, and does not voluntarily appear. But the railway property is here, and to this the lien and mortgage securing plaintiff's bonds inheres. Here, also, is the defendant corporation a corporation of this state.
>
> "In such cases, the court may entertain jurisdiction and proceed to the trial and adjudication of the suit between the parties who are properly before it, but the judgment and decree rendered therein shall not conclude or prejudice other parties not legally served with process, nor voluntarily appearing to answer. A nonjoinder of parties who are not inhabitants of nor found in the district as aforesaid shall not constitute matter of abatement or objection to the suit. Jud. Code, § 50.
>
> "The rule in equity No. 39 [quoted § 719, above], also negatives the contention. It provides that in all cases where it shall appear to the court that persons that might otherwise be deemed proper parties to the suit cannot be made parties by reason of their being without the jurisdiction of the court, or incapable otherwise of their being made parties, or because this joinder would oust the jurisdiction of the court as to parties before it. The court may in its discretion proceed in the cause, without making such persons parties, and in such

cases the decree shall be without prejudice to the rights of the absent parties. Thus Congress has taken action to remove the obstacle in the way of the plaintiff and the court which this motion to dismiss seeks to introduce.

"Obviously, to join the trustee as a party, as a citizen of another state, at this time, when it cannot be served, would be to hazard the jurisdiction of the court, to grant the preliminary relief now sought. While the trustee may be a proper party, and may be heard as to any right it may set up, it is clearly not an indispensable party to this application."

Where a contract was made by the corporation on behalf of subsidiary corporations of which it owns all the stock and takes all the profits earned, such subsidiary corporations are not necessary parties in a stockholders' suit to set the contract aside. (Ross v. Quinnesec Iron Mining Co. (6th Cir.), 227 Fed. 337, 142 C. C. A. 33.)

In suit (Grigsby v. Miller (Or.), 231 Fed. 521) by a deceased wife's administrator to set aside a deed given by her and her husband, the husband, though a proper and necessary, was held not an "indispensable, party," one so necessary that a decree without his presence would prejudice his rights and leave the case contrary to equity and good conscience, a party whose interest in the subject matter of the suit and the relief sought is so bound up with that of other parties that his legal presence as a party is an absolute necessity to the court's right to proceed, since, though the husband has an inchoate interest in the cause, in that, if plaintiff succeeded, he would be benefited by the litigation to the extent of having his title to the property potentially established, subject to the right of the administrator to subject it to the payment of the wife's debts, plaintiff as administrator could proceed without such husband as a party and obtain all the relief to which he was entitled, without affecting the husband's interests or rights.

§ 721. Nominal Parties.

Equity Rule 40. "Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena

upon him, need not appear and answer the bill unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him unless the court shall otherwise direct." (3 U. S. Comp. Stats. 1916, § 1536, p. 2514; Foster's Federal Practice, 5th ed., § 154, p. 561, § 409, p. 1284; Simkins' Federal Equity Suit, 3d ed., p. 239.)

§ 722. Heir as Party—Suit to Execute Trusts of Will.

Equity Rule 41. "In suits to execute the trusts of a will it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party if he desires to have the will established against him." (3 U. S. Comp. Stats. 1916, § 1536, p. 2514; Foster's Federal Practice, 5th ed., § 119, p. 435; Simkins' Federal Equity Suit, 3d ed., pp. 229, 254.)

§ 723. Joint and Several Demands.

Equity Rule 42. "In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable." (3 U. S. Comp. Stats. 1916, § 1536, p. 2515; Foster's Federal Practice, 5th ed., § 112, p. 414; Simkins' Federal Equity Suit, 3d ed., pp. 229, 240.)

§ 724. Saving Rights of Absent Parties Where Defendant Makes Tardy Objection.

Equity Rule 44. "If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties." (3 U. S. Comp. Stats. 1916, § 1536, p. 2515; Foster's Federal Practice, 5th ed., § 129, p. 456; Simkins' Federal Equity Suit, 3d ed., pp. 263, 427.)

CHAPTER 28.

INTERVENTION.

SEC.

730. Intervention—Last Part Rule 37.
731. Intervention Does not Lie for Unliquidated Demands.
732. Citizenship of Intervener and Amount of Claim not Material to Jurisdiction.
733. Procedure.

§ 730. Intervention—Last Part Rule 37.

Last Part Equity Rule 37. " . . . Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding." (§ 710 above; Atlas Underwear Co. v. Cooper Underwear Co., 210 Fed. 348; Hutchinson v. Philadelphia & G. S. S. Co., 216 Fed. 795.)

§ 731. Intervention Does not Lie for Unliquidated Demands.

In Glass v. Woodman (8th Cir.), 223 Fed. 621, 139 C. C. A. 167, the court held that the right of intervention does not necessarily follow from the absence of other remedy; but an intervener should have some interest in or claim to the demand in suit, or some connection with, interest in, or lien upon the subject matter of the litigation. The court also held that one having an unliquidated demand against the complainants in a foreclosure suit in a federal court, who are nonresident aliens, is not, because of such fact, entitled to intervene in the suit for the purpose of litigating his claim and enforcing the same against the interest of complainants therein.

The court in the case last above cited called attention to the two kinds of cases of intervention, stating page 623 as follows:

> "Some cases are so circumstanced that intervention is an absolute right; others rest in the discretion of the trial court, whose action will not be reviewed on appeal. (Credits Commutation Co. v. United States, 91 Fed. 570, 34 C. C. A. 12; Id., 177 U. S. 311, 44 L. Ed. 782, 20 Sup. Ct. 636.)"

§ 732. Citizenship of Intervener and Amount of Claim not Material to Jurisdiction. Intervention being in its nature auxiliary, the citizenship of the intervener is not material where the federal court has jurisdiction of the original suit and has in its possession the property or fund in which the intervener claims an interest. (Compton v. Jesup, 68 Fed. 279, 15 C. C. A. 397.)

Citizenship is material when the federal court does not have possession of the property or fund in which the intervener claims an interest. (United Electric Securities Co. v. Louisiana Elect. Light Co., 68 Fed. 673.)

Intervention will lie regardless of citizenship where the intervener claims an interest in attached property. (Gumbel v. Pitkin, 124 U. S. 132, 31 **L. Ed.** 374, 8 Sup. Ct. 379.)

The amount or value of the intervener's claim is also not material where the federal court has jurisdiction of the main suit. (People's Saving Inst. v. Miles, 76 Fed. 252, 22 C. C. A. 152.)

§ 733. Procedure. The procedure consists of filing an application and obtaining an order.

As to contents of the petition, see Empire Distilling Co. v. McNulta, 77 Fed. 701, 23 C. C. A. 415, 46 U. S. App. 578.

As to amendments, see Anthony v. Campbell, 112 Fed. 212, 50 C. C. A. 195.

The better practice is to give notice. (Central Trust Co. v. Madden, 70 Fed. 453, 17 C. C. A. 236.)

The petition may be contested by any parties to the suit. (Powell v. Leicester Mills, 92 Fed. 115.)

An order is made allowing the application, unless waived by filing an answer to the intervention. (Illinois Steel Co. v. Ramsey, 176 Fed. 853, 864, 100 C. C. A. 323.)

The order being granted, the applicant is a party to the suit in all subsequent proceedings giving the right of appeal. (Mercantile Trust & D. Co. v. Roanoke & S. R. Co., 109 Fed. 3, 8.)

CHAPTER 29.

STOCKHOLDERS' BILL.

SEC.

740. The Equity Rule—No. 27.
741. Stockholders' Bill—Old and New Rules Compared.
742. Same—Purposes of the Rule.
743. Allegation as to "Reason for not Making Such Effort."
744. Where Statutory Receiver has Been Appointed.

§ 740. The Equity Rule—No. 27.

Equity Rule 27. "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reason for not making such effort." (3 U. S. Comp. Stats. 1916, § 1536, p. 2505; Foster's Federal Practice, 5th ed., pp. 515, 521, 562, 849; Simkins' Federal Equity Suit, 3d ed., pp. 240, 243, 287, 425.)

This "verification by oath" is a requirement peculiar to this class of bills only, unless special relief pending suit be desired, as discussed under § 698, above.

§ 741. Stockholders' Bill—Old and New Rules Compared.

The rule is a re-embodiment of old Rule 94, promulgated in 1882, the language being identical, with the exception of the last phrase, "or the reason for not making such effort," which is new.

An examination of the decisions construing former Rule 94 makes clear the reasons for the addition of the phrase, it having been held that if the circumstances are such that it is apparent that efforts on the part of the plaintiff to secure such action as he desires by the directors or trustees or by the other shareholders of the corporation would be useless, then such efforts are unnecessary. But the circumstances manifesting the uselessness of such efforts must be clearly alleged. (Doctor v. Harrington, 196 U. S. 579, 49 **L. Ed.** 606, 25 Sup. Ct. 355; Delaware & H. Co. v. Albany & S. R. Co., 213 U. S. 435, 53 **L. Ed.** 862, 29 Sup. Ct. 540.)

Old Rule 94 expresses primarily the conditions which must precede the exercise of the right of a stockholder to protect the corporation, but emergencies may arise in which the antagonism between the directory and the corporate interests may be unmistakable and the requirements of the rule may be dispensed with, or, it is more accurate to say, do not apply. (Delaware & H. Co. v. Albany & S. R. Co., 213 U. S. 435, 53 **L. Ed.** 862, 29 Sup. Ct. 540; Hyams v. Calumet & Hecla Mining Co. (6th Cir.), 221 Fed. 529, 137 C. C. A. 239; Granite Brick Co. v. Titus (4th Cir.), 226 Fed. 557, 141 C. C. A. 313; Dana v. Morgan (S. D. N. Y.), 219 Fed. 313.)

Thus an allegation that the defendants who made the contract and benefit by it are in absolute control of the affairs of the corporation is sufficient to excuse efforts to secure action by the officers. (Ross v. Quinnesec Iron Mining Co. (6th Cir.), 227 Fed. 337, 142 C. C. A. 33.)

So where a stockholder sues on behalf of the corporation to set aside an alleged fraudulent contract made by it, formal request of the corporation to sue may be excused where the circumstances show that it would have been futile. (Dana v. Morgan (S. D. N. Y.), 219 Fed. 313.)

Where the allegations in a petition for leave to intervene in bankruptcy proceedings of stockholders of the defendant corporation, and the proposed answer made a part thereof showed that an adjudication in bankruptcy was not being opposed by

the directors, so that they might acquire the property at less than its value, Equity Rule 27, requiring that the stockholder of a corporation, seeking to bring a stockholder's action, must have endeavored to secure such action as he desires on the part of the directors, will be dispensed with, as is the case where the pleadings show that the interests of the directors are antagonistic to those of the corporation. (Ogden v. Gilt Edge Consol. Mines Co. (8th Cir.), 225 Fed. 723, 140 C. C. A. 597.)

By the addition of the alternative phrases, Rule 27 is made broad enough to cover all cases in which a stockholder may bring a suit "founded on rights which may properly be asserted by the corporation," and conforms to the law as declared by the cases above cited, recognizing that there may be reasons which excuse the efforts of the plaintiff to secure action by the directors or stockholders.

A full and unequivocal compliance with the requirements of the rule is necessary. (Ziegler v. Lake Street El. R. Co., 76 Fed. 662, 22 C. C. A. 465.) The absence of either of the required allegations constitutes ground for a motion to dismiss the bill. (Illinois Central R. R. Co. v. Adams, 180 U. S. 28, 45 **L. Ed.** 410, 21 Sup. Ct. 251; Equity Rule 29; Venner v. Great Northern Ry. Co., 153 Fed. 408.)

§ 742. Same—Purposes of the Rule. The purposes of the rule are obvious, to wit:

1. It is intended to preclude persons from buying stock in corporation for the purpose of extortion by litigation; hence the requirement of the allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law. (Robinson v. West Virginia Loan Co., 90 Fed. 770, 772; Dimpfel v. Ohio & M. Ry. Co., 110 U. S. 209, 28 **L. Ed.** 121, 3 Sup. Ct. 573.)

2. The purpose of the clause requiring it to be alleged "that the suit is not a collusive one, to confer on a court of the United States jurisdiction of a cause of which it would not otherwise

have cognizance," is "to secure the federal court from imposition upon the jurisdiction." (Delaware & H. Co. v. Albany & S. R. Co., 213 U. S. 435, 53 **L. Ed.** 862, 29 Sup. Ct. 540; Young v. Alhambra Min. Co., 71 Fed. 810.)

The rule was intended only to exclude cases brought by a stockholder collusively in order to give apparent jurisdiction to a court which would not have it if the suit were by the corporation. (Delaware & H. R. Co. v. Albany & S. R. Co., 213 U. S. 435, 53 **L. Ed.** 862, 29 Sup. Ct. 540.)

3. The remainder of the rule, requiring that the bill "set forth with particularity the efforts of the plaintiff to secure such action as he desires, on the part of the managing directors or trustees, and if necessary, of the shareholders, and the causes of his failure to obtain such action or the reason for not making such effort," recognizes the right of the corporate directory to corporate control, making the corporation paramount even when its rights are to be protected or sought through litigation. (Kelly v. Dolan (E. D. Pa.), 218 Fed. 966.)

§ 743. Allegation as to "Reason for not Making Such Effort." The court, in Russell v. Shippen Bros. Lumber Co. (N. D. Ga.), 224 Fed. 254, 256, says:

> "In the original bill there was a paragraph in the following language:
>
> "'Your orators are further informed, and on information and belief allege, that the chief executive officer of the said lumber company is among said claimants, and avers an indebtedness against said company in a large amount, which indebtedness is not admitted by your orators; and your orators aver that the validity of said indebtedness so claimed should be carefully investigated before the same is paid by said lumber company, and that there are equitable rights in favor of said lumber company against said chief executive which should be asserted in favor of said company by one whose interest does not conflict with his duties.'
>
> "This is clearly defective in pleading what it was evidently intended for in compliance with new rule No. 27, quoted.

"This last language, 'or the reasons for not making such effort,' was added to old equity rule 94, and is now a part of the same rule, known in the new rules as No. 27, as stated.

"The supplemental bill, after stating that William H. Shippen sets up claim against the Shippen Bros. Lumber Company for over $50,000, proceeds in this language:

"'Your orators further aver that it would be useless to make demand upon said William H. Shippen to file suit against himself, and that your orators have made demand upon the Shippen Bros. Lumber Company, one of the defendants herein, and upon its officers and directors, that defendant institute suit against the said William H. Shippen and Frank E. Shippen for the purpose of enjoining and restraining them and their agents from acting as officers and directors of the said lumber company, and for the purpose of restraining them from diverting the assets of the said company, and restraining them from asserting any rights and liabilities which they or either of them claim against said Shippen Bros. Lumber Company on any account whatsoever, and especially upon a certain alleged note of said Shippen Bros. Lumber Company claimed to be held and owned by the said William H. Shippen, and that for reasons unknown to your orators this demand has been refused. This suit is not filed for the purpose of collusively giving jurisdiction to this honorable court of a cause of which it has not jurisdiction.'

"This allegation seems to be sufficient, under rule 27. . . .

"Considered as a stockholders' proceeding against the Shippen Bros. Lumber Company originally, as I have stated, I think what was alleged in the original bill in compliance with equity rule 27, though defective, was cured by this supplemental bill and by the allegations therein made. . . .

"The motion to dismiss will be overruled and denied."

§ 744. Where Statutory Receiver has Been Appointed. Where a corporation is stripped of its assets by act of its directors, the right of action is not only primarily, but until it has passed to others is always, in the corporation, and the recovery is for its benefit; it being necessarily a party.

And where a corporation is injured by the acts of its directors, it in general may sue or withhold the right to sue, and the action, when brought, must be brought by it and in its name.

But where a corporation is injured by being deprived of its assets by directors, and on demand of a stockholder fraudulently refused to sue, the stockholder may maintain a bill for its benefit.

Where a statutory receiver has been appointed for a corporation, neither the corporation nor a stockholder can maintain an action for alleged loss of the corporation's assets without the sanction of the court appointing the receiver, but with such sanction a suit for the corporation's benefit may be brought in a foreign jurisdiction in which defendants can be served.

Where a statutory receiver has been appointed for a corporation, a stockholder, with the consent of the court appointing the receiver, may sue in equity, for the benefit of the corporation and its receiver, to redress, in a foreign jurisdiction, an injury to the corporation. (Kelly v. Dolan (E. D. Pa.), 218 Fed. 966.)

CHAPTER 30.

JOINDER OF CAUSES OF ACTION.

SEC.
750. The Equity Rule—No. 26.
751. Rule Available to Both Parties Alike.
752. Examples of Joinder.
753. Causes of Action must be Within Court's Jurisdiction to be Joined.

§ 750. The Equity Rule—No. 26.

Equity Rule 26. "The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there is more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials." (3 U. S. Comp. Stats. 1916, § 1536, p. 2505.)

This is a new rule.

§ 751. Rule Available to Both Parties Alike. Rule 26 (also a new rule) authorizes the plaintiff to "join in one bill as many causes of action cognizable in equity as he may have against the defendant," and a proper construction of Rule 30 gives the defendant the same option; thus both parties are, in the matter of joining causes of action, placed on an equal footing. In the case of the plaintiff so joining, the court, by express authority contained in the concluding sentence of Rule 26, is given discretion to order separate trials if it appears that such "causes cannot be conveniently disposed of together." In case the joinder is the result of the defendant's action, the court has a like discretion. Rule 30 declares that such counterclaim "shall have the same effect as a cross-suit," and by analogy, if not by neces-

sary implication, the defendant in such cross-suit is to be treated as a plaintiff, and the joinder of different causes of action by him in one suit is subject to the court's power of ordering separate trials if they "cannot be conveniently disposed of together." (Electric Boat Co. v. Lake Torpedo Boat Co. (D. N. J.), 215 Fed. 377, at p. 381.)

§ 752. Examples of Joinder. Where diverse citizenship exists between the parties and the requisite amount is involved to give a federal court jurisdiction, a cause of action for infringement of a trademark and one for unfair competition may be joined in one suit. (Samson Cordage Works v. Puritan Cordage Mills (6th Cir.), 211 Fed. 603, **L. R. A.** 1915F, 1107, 128 C. C. A. 203.)

As to joinder of causes of action under copyright act, see L. A. Westermann Co. v. Dispatch Printing Co. (6th Cir.), 233 Fed. 609, 611, 147 C. C. A. 417.

A bill for the foreclosure of two mortgages is not multifarious, but within Equity Rule 26 above quoted, permitting the joinder of causes of action when it will promote the convenient administration of justice. (Crawford v. Washington Northern R. Co., 233 Fed. 961, 966, 147 C. C. A. 635.)

§ 753. Causes of Action must be Within Court's Jurisdiction to be Joined. Under Equity Rule 26, authorizing a joinder of causes of action, a suit of which a federal court has jurisdiction because of the nature of the cause of action cannot be used as a means for bringing within its jurisdiction a different cause of action between the same parties, over which the court would have jurisdiction only on the ground of diversity of citizenship which does not exist. (Vose v. Roebuck Weatherstrip & Wire Screen Co., 210 Fed. 687.)

Thus in Unit Const. Co. v. Huskey Mfg. Co., 241 Fed. 129, it was held that a federal court is not given jurisdiction of a suit for unfair competition between citizens of the same state by the fact that it is joined with a cause of action for infringement of a patent, nor because the unfair competition charged is con-

nected with the sale of the alleged infringing articles. (Equity Rule 26 does not apply.)

Patent infringement and unfair competition in trade are separate causes of action, distinct in their nature. Patent infringement is the violation of an exclusive monopoly created by statute, while no element of monopoly is involved in unfair competition.

CHAPTER 31.

AMENDMENTS.

SEC.
760. Amendments—Rules 28 and 19.
761. Amendments to Cure a Variance.
762. Amendment—Where Plaintiff Fails to Set Down for Argument Objection in Answer for Defect of Parties—Rule 43.
763. Amendment on Death of Party—Rule 45.

§ 760. Amendments—Rules 28 and 19.

As of course.

Equity Rule 28. "The plaintiff may, as of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by the court or judge." (3 U. S. Comp. Stats. 1916, § 1536, p. 2507; Foster's Federal Practice, 5th ed., p. 716; Simkins' Federal Equity Suit, 3d ed., pp. 354, 355, 362, 363.)

Under former rule the plaintiff was permitted, unless the amendments were numerous, to furnish copies of the amendments only, with suitable references as to their proper places of insertion.

Not as of course.

If the plaintiff fails to amend before the defendant files his pleading in response to the bill, his right to do so as of course is gone, and he must then obtain the consent of the defendants or leave of court or of the judge before his amendment can be effective under Rule 28.

Equity Rule 19. "The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended

or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." (3 U. S. Comp. Stats. 1916, § 1536, p. 2502; Foster's Federal Practice, 5th ed., p. 716; Simkins' Federal Equity Suit, 3d ed., pp. 201, 286, 321, 354, 586, 729.)

Any error or defect in the bill which does not affect the substantial right of party will be disregarded by the court even in the absence of an offer to amend.

These rules, 19 and 28, covering the subject of amendments to the bill, supplant former Equity Rules 28, 29, 30, 45 and 46, and their apparent effect is to greatly broaden the power of the courts in permitting amendments at any or all stages of the proceeding.

An examination of the decisions on this point under the former rule, however, discloses the fact that the courts have always considered that the power of a court of equity to grant amendments is wholly discretionary, and that in furtherance of justice they will not consider themselves hampered by the particular rules in court. The federal courts have always been guided in this regard by the circumstances of the particular case, and Equity Rules 19 and 28, seemingly more liberal than their predecessors, are in reality little more than the embodiment of the law as it has long been construed by the court.

In a case decided since the above text was written the court said:

"The allowance or refusal of amendments is a matter which is largely within the sound discretion of a trial court, and in the absence of a clear abuse thereof its action is not reviewable on appeal. We cannot say that the court grossly abused its discretion in refusing to allow the bill to be amended. The fact that we might have permitted the bill to be amended, if we had been in the trial court's place, would not justify us in interfering with the exercise of that court's discretion, unless we were satisfied that its discretion had been grossly abused." (Williams v. Cobb (2d Cir.), 219 Fed. 663, at p. 669, 134 C. C. A. 217.)

§ 761. Amendments to Cure a Variance. It was held to be stating a new cause of action against which the statute of limitations had run to change a complaint for damages because of alleged incompetency of a fellow-servant known to the employer and not known to the plaintiff, where there was failure to allege negligence, to a complaint charging that plaintiff was injured through the negligent act of a fellow-servant and that a statute of Kansas, within which the injury occurred, made the railroad company liable for the negligent act of a fellow-employee, regardless of his incompetency and of knowledge thereof. This would be a departure from law to law. (Union Pac. Ry. Co. v. Wyler, 158 U. S. 285, 39 **L. Ed.** 983, 15 Sup. Ct. 877.)

So, also, it was a departure from law to law to change a complaint seeking damages for alleged breach of warranty in a contract of sale to one alleging rescission on the ground of fraud, and seeking recovery of the purchase price paid. (Whalen v. Gordon, 95 Fed. 305, 37 C. C. A. 70.)

On a fact basis it was held a departure to change a complaint for an unconditional recovery of property on the ground of fraud to a bill to redeem. (Warner v. Godfrey, 186 U. S. 365, 46 **L. Ed.** 1203, 22 Sup. Ct. 852.)

On the other hand, where the broad basis of fact was the injury to plaintiff, without fault on his part, through the negligence of the railway company with respect to the appliances on which he was working at the time, it was held not to be a departure to change the original declaration charging negligence on account of "the defective condition of the cross-ties and roadbed" to a charge that plaintiff was injured "on account of the drawhead and coupling-pin not being suitable to the purpose for which they were used; he being ignorant thereof and of the defective condition of the tracks." (Texas & P. Ry. Co. v. Cox, 145 U. S. 593, 36 **L. Ed.** 829, 12 Sup. Ct. 905.)

From an analysis of these cases and under Equity Rule 19 the circuit court of appeals (7th circuit), affirmed a decree where an amendment to the complaint had been permitted where the bill was to enforce a statutory lien for work done under a certain

contract and oral modification and the amended bill set up the same statutory right but alleged an adoption with a modification of the contract set up in the original contract. (Galesburg & K. El. Co. v. Hart, 221 Fed. 7, 136 C. C. A. 533.)

§ 762. Amendment—Where Plaintiff Fails to Set Down for Argument Objection in Answer for Defect of Parties—Rule 43.

Equity Rule 43. "Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require." (3 U. S. Comp. Stats. 1916, § 1536, p. 2515; Foster's Federal Practice, 5th ed., § 129, p. 456; Simkins' Federal Equity Suit, 3d ed., pp. 262, 264, 426.)

§ 763. Amendment on Death of Party—Rule 45.

Equity Rule 45. "In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion, may take the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary." (3 U. S. Comp. Stats. 1916, § 1536, p. 2515; Foster's Federal Practice, 5th ed., § 216, p. 736, § 221, p. 750, § 224, p. 753; Simkins' Federal Equity Suit, 3d ed., pp. 379, 381, 382, 383, 442.)

CHAPTER 32.

SUPPLEMENTAL PLEADING.

SEC.

770. The Equity Rule—No. 34.
771. Supplemental Pleading Used to Bring in Matters Occurring Since Original Pleading Filed.
772. Allowance of Supplemental Pleadings in Court's Discretion.
773. Equity Rule 35 as to Form of Supplemental Pleading.

§ 770. The Equity Rule—No. 34.

Equity Rule 34. "Upon application of either party, the court or judge, may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit, determining the matters in controversy or a part thereof." (3 U. S. Comp. Stats. 1916, § 1536, p. 2512; Foster's Federal Practice, 5th ed., § 231 et seq., p. 765; Simkins' Federal Equity Suit, 3d ed., pp. 366, 368, 370, 371, 376, 438, 439.)

§ 771. Supplemental Pleading Used to Bring in Matters Occurring Since Original Pleading Filed. In Kryptok Co. v. Haussmann & Co. (E. D. Pa.), 216 Fed. 267, at p. 268, the court said:

"As the matters sought to be brought into the pleadings have occurred since the filing of the original bill, they cannot be brought in by amendment, but must be by supplemental bill. If a plaintiff be without a cause of action at the time of the filing of his bill, he is not helped, in the sense of having his action continued, by bringing in subsequent matters which constitute a good cause of action but which are sought to be brought in after answer filed. *A fortiori* he would not be entitled to a preliminary injunction in the same suit. The legal effect, however, of the matters sought to be introduced here does not go to the existence of an original cause of action

but to a confirmation of it, out of or from which, as a matter of practice, the allowance of certain incidental rights flow.

"Rule 34 was adopted to meet just such a contingency, and is directly applicable in the present case."

§ 772. Allowance of Supplemental Pleadings in Court's Discretion. Under old Rule 57, now Equity Rule 34, the action of the court, in refusing to permit supplemental pleadings, could be reviewed only in case of gross abuse of discretion. (Liebiging v. Matthews (8th Cir.), 216 Fed. 1, 132 C. C. A. 245.)

§ 773. Equity Rule 35 as to Form of Supplemental Pleading.

Equity Rule 35. "It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it." (3 U. S. Comp. Stats. 1916, § 1536, p. 2512; Foster's Federal Practice, 5th ed., § 223, p. 752, and § 232, p. 772; Simkins' Federal Equity Suit, 3d ed., pp. 372, 375, 383.)

CHAPTER 33.

REVIVOR.

SEC.

780. The Equity Rule—No. 45.
781. Revivor may be Made by Motion—Time.
782. Revival in Stockholder's Suit.

§ 780. The Equity Rule—No. 45.

Equity Rule 45. Death of party—Revivor. "In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion, may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary." (3 U. S. Comp. Stats. 1916, § 1536, p. 2515; Foster's Federal Practice, 5th ed., pp. 736, 750, 753; Simkins' Federal Equity Suit, 3d ed., p. 379 et seq., and p. 442.)

This is a new rule superseding old Rule 56.

§ 781. Revivor may be Made by Motion—Time. In Spring v. Webb (D. Vt.), 227 Fed. 481, the court held that revivor should be moved within a reasonable time after plaintiff's death, otherwise a motion to dismiss was proper. The court said:

> "Bills of revivor are cumbrous survivals of antiquity, and in my judgment Rule 45 was intended to regulate and make identical the method of revival and the method of penalizing a failure to revive; i. e., to make simple motions applicable to both contingencies."

This is a different rule of procedure from that established under old Rule 56. (Dillard's Admr. v. Central Virginia Iron

Co., 125 Fed. 157; Fitzpatrick v. Domingo, 14 Fed. 216, 4 Woods, 163; Brown v. Fletcher, 140 Fed. 639.)

§§ 955 and 956, Rev. Stats., quoted above in §§ 561 and 562, together with Equity Rule 45, control the revival of actions in the federal courts, the equity rule, of course, not applying to law actions.

§ 782. Revival in Stockholder's Suit. A stockholder's suit, in which the bill charges the failure or refusal of the corporation to bring action for torts against the defendants, is capable of revivor, after the death of the original plaintiff, in the name of any other shareholder similarly situated, or in the name of the deceased plaintiff's executors, if his shares of stock have descended to them, even conceding that actions of tort fail with the death of the plaintiff under the state law, and that the United States courts obey, in respect of abatement and revival, the laws of the state in which they sit, since the cause of action put forward in a stockholder's suit is derivative, and the stockholder's primary right of the corporation, which does not fail with the stockholder's death. (Spring v. Webb (D. Vt.), 227 Fed. 481.)

CHAPTER 34.

PROCESS IN EQUITY.

SEC.

790. The Summons in Equity is the Subpoena.
791. Issue—Form—Return of Subpoena.
792. The Precipe.
793. The Subpoena.
794. Alias Subpoenas.
795. Process in Behalf of and Against Persons not Parties.
796. Process by Whom Served.
797. Manner of Serving Subpoenas.
798. Forms of Returns.
799. Form of Process and Return—How Governed.
800. Substituted Service.

§ 790. The Summons in Equity is the Subpoena.

Equity Rule 7. "The process of subpoena shall constitute the proper mesne process in all suits of equity, in the first instance, to require the defendant to appear and answer the bill." (3 U. S. Comp. Stats. 1916, § 1536, p. 2498; Foster's Federal Practice, 5th ed., pp. 570, 574; Simkins' Federal Equity Suit, 3d ed., pp. 312, 313.)

§ 791. Issue—Form—Return of Subpoena.

Equity Rule 12. "Whenever a bill is filed, and not before, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpoena against all the defendants." (3 U. S. Comp. Stats. 1916, § 1536,

p. 2500; Foster's Federal Practice, 5th ed., pp. 570, 571; Simkins' Federal Equity Suit, 3d ed., pp. 285, 313, 318, 319, 330, 385, 394, 406, 431, 454.)

§ 792. The Precipe. The "application of the plaintiff" mentioned in Rule 12 (§ 791, above) is called the "precipe." This is a printed form which may be obtained from the clerk. The following form is suggested:

United States of America.

District Court of the United States, —— District of ——, —— Division.

——— vs. ———
Clerk's Office.
No. ——
Precipe

To the Clerk of Said Court, Sir:

Please issue ——.

After the words "please issue" there may be inserted the following: Subpoena for the defendants [naming them].

Dated ——.

——, Attorney for Plaintiff.

§ 793. The Subpoena. After filing of the bill and the precipe, the clerk will issue, sign, and seal a subpoena. The subpoena is a printed form entitled in the court from which it issues, and under § 911, Rev. Stats. (§ 522, *supra*), it is in the name of the President of the United States bearing teste of the judge of the district court. The following form is sufficient:

United States of America.

District Court of the United States, —— District of ——, —— Division.

In Equity.

The President of the United States of America, Greeting.

To ——:

You are hereby commanded to appear in said district court of the United States aforesaid within the time specified in the memorandum below to file your answer or other defense to a bill of complaint exhibited against you in said court by —— who —— citizen of the —— and to do and receive what the court shall have considered in that behalf. And this you are not to omit under penalty of five thousand dollars.

Witness the Honorable —— district judge of said court this —— day of —— in the year of our Lord one thousand nine hundred —— and of our Independence, one hundred and ——.

——, Clerk.
By ——, Deputy Clerk.

Memorandum Pursuant to Equity Rule 12.

You are hereby required to file your answer or other defense in the above suit in the clerk's office of said court pursuant to said bill, on or before the twentieth day after service hereof upon you, excluding the day thereof, otherwise the said bill will be taken pro confesso.

——, Clerk.
By ——, Deputy Clerk.

§ 794. Alias Subpoenas. Inasmuch as the subpoena is returnable into the clerk's office twenty days from the issuing thereof, it will frequently happen that there will be a failure to serve within the time in which the subpoena must be returned. If service be not made within the time limited an alias subpoena may issue.

Equity Rule 14. "Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to other subpoenas against such defendant, until due service is made." (3 U. S. Comp. Stats. 1916, § 1536, p. 2501; Foster's Federal Practice, 5th ed., p. 573; Simkins' Federal Equity Suit, 3d ed., p. 313.)

§ 795. Process in Behalf of and Against Persons not Parties.

Equity Rule 11. "Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may enforce obedience to such order by the same process as if he were a party; and every person, not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party." (3 U. S. Comp. Stats. 1916, § 1536, pp. 2499, 2500; Foster's Federal Practice, 5th ed., p. 1343; Simkins' Federal Equity Suit, 3d ed., p. 590.)

§ 796. Process by Whom Served.

Equity Rule 15. "The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person especially appointed by the court or judge for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof." (3 U. S. Comp. Stats. 1916, § 1536, p. 2501; Foster's Federal Practice, 5th ed., pp. 574, 576; Simkins' Federal Equity Suit, 3d ed., p. 315.)

Under this rule the marshal serves the process in equity. (United States v. Mitchell (E. D. N. Y.), 223 Fed. 805, 806.)

§ 797. Manner of Serving Subpoenas.

Equity Rule 13. "The service of all subpoenas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family." (3 U. S. Comp. Stats. 1916, § 1536, p. 2500; Foster's Federal Practice, 5th ed., p. 574; Simkins' Federal Equity Suit, 3d ed., pp. 315, 316.)

§ 798. Forms of Returns. In the event that the service is made on the defendant personally, the marshal's certificate may be in the following form:

United States Marshal's Office.
—— District of ——. } ss.

I hereby certify that I received the within writ on the —— day of ——, and personally served the same on and by delivering to and leaving with —— and —— said defendants named therein, personally, at the county of —— in said district a copy thereof ——.

——, United States Marshal.

By ——, Deputy.

Dated at ——, 19—.

If someone other than the marshal or his deputy make service, his affidavit should be in form somewhat as follows for personal service:

State of ——.
County of ——. } ss.

—— being first duly sworn on oath says: That on the —— day of —— 19—, he personally served same on —— and —— by delivering to and leaving with —— and —— said defendant —— named therein personally in the county of —— in the said district, a copy thereof ——.

——

Subscribed and sworn to before me this —— day of ——, 19—.
[Seal]

——
(Official Designation.)

In the event that the service is not made on the defendant personally, but by substituted service authorized in the above-quoted Equity Rule 13 (§ 797, above), the marshal's return or the affidavit of service as the case may be should show this fact by reciting that he personally served the writ on the defendants named "by leaving a copy thereof at the dwelling house (or if the defendant has no dwelling house then state 'at the usual place of abode') of the defendant with . . . an adult person who is a member of (or if not a member state 'who is a resident in') the family."

§ 799. Form of Process and Return—How Governed.

§ *913, Rev. Stats.* "The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the [circuit and] district courts shall be according to the principles, rules, and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any [circuit or] district court, not inconsistent with the laws of the United States." (6 Fed.

Stats. Ann., 2d ed., p. 18; 3 U. S. Comp. Stats. 1916, § 1536, p. 2496; Foster's Federal Practice, 5th ed., p. 1428.)

§ *922, Rev. Stats.* "When the marshal or his deputy is a party in any cause, the writs and precepts therein shall be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them." (6 Fed. Stats. Ann., 2d ed., p. 81; 3 U. S. Comp. Stats. 1916, § 1548, p. 3107; Foster's Federal Practice, 5th ed., p. 575.)

§ 800. **Substituted Service.** In Johnson-Brown Co. v. Delaware, L. & W. R. Co. (S. D. Ga.), 239 Fed. 590, it was held that substituted service of a bill in equity against a foreign corporation, made on its attorney without any order having been procured therefor, is invalid; the proper procedure being to apply for an order for such service, accompanied by an affidavit showing its necessity.

In a suit by a trustee in bankruptcy to set aside as a preference an assignment of a debt owing to the bankrupt by a nonresident, where the debtor admitted the debt and offered to, but did not, pay the money into court, the court cannot obtain jurisdiction over the assignees, who were nonresidents of the district, by substituted service under Jud. Code, § 57 (§ 526, *supra*), providing that, in any suit to enforce a lien on or claim to real or personal property within the district where the suit is brought, an absent defendant may be served with an order to defend wherever he may be found or by publication, since the jurisdiction conferred by that section rests on a real and not a constructive basis, and the existence of the property within the district is essential to the court's jurisdiction. (Murphy v. Ford Motor Co., 241 Fed. 134.)

CHAPTER 35.

DECREE PRO CONFESSO.

SEC.

810. Time for Defensive Pleading Twenty Days After Service of Subpoena.
811. Default When Taken.
812. Pleading Required to Save from Decree Pro Confesso.
813. Decree Pro Confesso When Made Final.

§ 810. Time for Defensive Pleading Twenty Days After Service of Subpoena.

Equity Rule 12. " . . . At the bottom of the subpoena shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*. . . . " (3 U. S. Comp. Stats. 1916, § 1536, p. 2500; Foster's Federal Practice, 5th ed., pp. 570, 571; Simkins' Federal Equity Suit, 3d ed., pp. 313, 318, 330, 385, 386, 394, 406, 431.)

But the time above mentioned under Rule 16 (§ 811, below) may be enlarged "for cause shown by a judge of the court." Rules 12 and 16 should be read together.

§ 811. Default When Taken.

Equity Rule 16. "It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpoena as required by Rule 12, quoted in the preceding section. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte.*" (3 U. S. Comp. Stats. 1916, § 1536, p. 2501; Foster's Federal Practice, 5th ed., pp. 614, 617, 623, 681; Simkins' Federal Equity Suit, 3d ed., pp. 330, 385, 386, 387, 390, 394, 406, 431, 454.)

§ 812. Pleading Required to Save from Decree Pro Confesso. In order to save from default, the defendant, under Rule 16 (§ 811, above), "unless the time shall be enlarged for cause shown, by a judge of the court," is required "to file his answer or other defense to the bill in the clerk's office within the time named in the subpoena, as required by Rule 12 "(§ 810, above), to wit, "on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso.*"

What is such "other defense" as will save a defendant from the taking of the bill against him *pro confesso*?

To avoid confusion it must be remembered that the state rules as to pleadings do not apply to federal equity suits, but the federal equity rules and decisions wholly determine the procedure, time, order, and manner of pleading. Hence the filing of a written appearance, a motion for security for costs, a demurrer, a plea, or any other defensive pleading not authorized by the federal equity rules, would not be sufficient to save from default in a federal equity suit even though sufficient in a similar suit in the state courts under the state practice of the state wherein the federal court may be located.

Under the new rules in force February 1, 1913, the following would seem to come under the term "other defense," which would save from default: (1) A special appearance by motion to quash the process on some jurisdictional ground; (2) under Rule 29, motion to dismiss on certain points of law arising upon the face of the bill (chapter 39, *post*); (3) under Rule 20, a motion makes more definite and certain (chapter 41, *post*); (4) under Rule 21, a motion to strike redundant, impertinent or scandalous matter (chapter 42, *post*); (5) under Rule 22, a motion to transfer to the law side an action at law erroneously begun as a suit in equity (chapter 37, *post*). It is, however, not certain that anything other than a motion to dismiss is intended by the term "other defense," as there is no time designated for filing answer except after overruling any other motion than a motion to dismiss or after filing an amended bill.

§ 813. Decree Pro Confesso When Made Final.

Equity Rule 17. "Decree pro confesso to be followed by final decree—setting aside default. When the bill is taken *pro confesso* the court may proceed to a final decree at any time after the expiration of thirty days after the entry of the order *pro confesso,* and such decree shall be deemed absolute unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit. No such motion shall be granted, unless upon the payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause." (3 U. S. Comp. Stats. 1916, § 1536, p. 2501; Foster's Federal Practice, 5th ed., p. 618; Simkins' Federal Equity Suit, 3d ed., pp. 385, 387, 391, 393.)

CHAPTER 36.

DEFENSIVE PLEADINGS—EQUITY.

SEC.
820. Kinds of Defensive Pleading.
821. Motion Day.
822. Notices.
823. Motions Grantable of Course.
824. Defect of Parties.
825. Notice of Orders.

§ 820. Kinds of Defensive Pleading. Under Equity Rule 29 (chapter 39, *post*), demurrers and pleas are abolished, and under Equity Rule 21 (chapter 42, *post*), the right to except to bills and other proceedings for scandal or impertinence shall not obtain. The old forms have evidently been abandoned so that the new proceedings will not be confused by them. All defenses are made either by motions or in the answer, and all issues not requiring trial of the principal case may be determined on short notice before the trial.

§ 821. Motion Day.

Equity Rule 6. "Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district." (3 U. S. Comp. Stats 1916, § 1536, p. 2498; Foster's Federal Practice, 5th ed., p. 804; Simkins' Federal Equity Suit, 3d ed., pp. 129, 204, 307, 310, 311.)

§ 822. Notices.

Second Paragraph Equity Rule 1. " . . . Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court." (3 U. S. Comp. Stats. 1916, § 1536, p. 2497; Foster's Federal Practice, 5th ed., § 251, p. 798; Simkins' Federal Equity Suit, 3d ed., pp. 309, 332, 371, 402.)

Part Equity Rule 6. " . . . but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings, and proceedings for the advancement, conduct, and hearing of causes." (3 U. S. Comp. Stats. 1916, § 1536, p. 2498; Simkins' Federal Equity Suit, 3d ed., pp. 129, 204, 310, 311, 332, 371, 402, 404, 414.)

Part Equity Rule 29. " . . . If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered." (3 U. S. Comp. Stats. 1916, § 1536, p. 2508.)

Part Equity Rule 73. " . . . Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. . . . " (3 U. S. Comp. Stats. 1916, § 1536, p. 2526; Foster's Federal Practice, 5th ed., § 255, p. 815, § 257, p. 817, § 291, p. 905; Simkins' Federal Equity Suit, 3d ed., p. 475.)

Under Equity Rule 33 (Chapter 46, *post*) the plaintiff on five days' notice, or such further time as the court may allow, tests the sufficiency of an affirmative defense in the answer by a motion to strike out.

§ 823. Motions Grantable of Course.

Equity Rule 5. "All motions and applications in the clerk's office for the issuing of mesne process or final process to enforce and execute decrees; for taking bills *pro confesso;* and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge, shall be deemed motions and applications grantable of course by the clerk; but the same may be suspended or altered or rescinded by the judge upon special cause shown." (3 U. S. Comp. Stats. 1916, § 1536, p. 2498; Foster's Federal Practice, 5th ed., pp. 797, 819; Simkins' Federal Equity Suit, 3d ed., pp. 306, 310; Columbia Metal Box Co. v. Halper, 220 Fed. 912, 136 C. C. A. 478.)

§ 824. Defect of Parties.

Equity Rule 43. "Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require." (3 U. S. Comp. Stats. 1916, § 1536, p. 2515; Foster's Federal Practice, 5th ed., § 129, p. 456; Simkins' Federal Equity Suit, 3d ed., pp. 262, 264, 426.)

Equity Rule 44. "If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties." (3 U. S. Comp. Stats. 1916, § 1536, p. 2515; Simkins' Federal Equity Suit, 3d ed., pp. 263, 427.)

§ 825. Notice of Orders.

Equity Rule 4. "Neither the noting of an order in the equity docket nor its entry in the order book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the equity docket, which shall be taken as sufficient proof of due notice of the order." (3 U. S. Comp. Stats. 1916, § 1536, p. 2498; Foster's Federal Practice, 5th ed., pp. 798, 813, 819, 1364; Simkins' Federal Equity Suit, 3d ed., p. 309.)

CHAPTER 37.

TRANSFERRING TO LAW SIDE—ADEQUATE REMEDY AT LAW.

SEC.

840. Action at Law Erroneously Begun as Suit in Equity to be Transferred to Law Side Under Rule 22.
841. Amendment of Pleadings to Conform Action to Proper Side of Court—Law or Equity.
842. Amendment Setting Up a New Cause of Action Does not Relate Back to Prevent Bar of Statute of Limitations.
843. Motion Should be to Transfer to Law Side Under Rule 22 or to Determine Questions of Law Under Rule 23, and not to Dismiss Under Rule 29.
844. Rules 22 and 23 Do not Change Mode of Beginning a Suit in Equity.
845. Equity Suits not Maintainable Where Legal Remedy Adequate.
846. What is an Adequate Remedy at Law.
847. Necessity of Mixed Character of Remedies Gives Equity Jurisdiction as Legal Remedy Alone is not Then Adequate.
848. Where Recovery of Money is Only Relief Sought Remedy at Law is Adequate.
849. Where Account may be Adjusted by Jury Remedy at Law Adequate.
850. Where Remedy at Law Does not Afford a Practical and Efficient Result Equity may Take Jurisdiction.
851. When Legal Remedy Need not be Exhausted to Maintain Creditor's Bill.

§ 840. Action at Law Erroneously Begun as Suit in Equity to be Transferred to Law Side Under Rule 22.

Equity Rule 22. "If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential." (3 U. S. Comp. Stats. 1916, § 1536, p. 2502; Foster's Federal Practice, 5th ed., pp. 336, 725, 1184; Simkins' Federal Equity Suit, 3d ed., pp. 27, 28, 29, 302, 552.)

Under this rule the motion is to transfer to the law side and not to dismiss. (Corsicana National Bank v. Johnson (5th Cir.), 218 Fed. 822, 134 C. C. A. 510.)

Plaintiff should not be turned out of court but should be permitted to alter his complaint by adopting such parts thereof as he may be able to utilize as a basis for his complaint at law. (Watson v. Huntington (2d Cir.), 215 Fed. 472, 131 C. C. A. 520.)

The rule is much broadened by the Act of March 3, 1915, c. 90, adding § 274a to the Judicial Code, quoted in § 841, below.

> "The rule and the statute have swept away any and all technical objection whatever, and a motion to dismiss on the ground of an adequate remedy at law will not lie." (Collins v. Bradley (W. D. Wis.), 227 Fed. 199, 201.)

Under the above rule a motion was made to transfer the case to the law side of the court. With the exception of a claim for a balance of salary, the subject matter of the suit was held to be equitable and the motion denied, under Equity Rule 23 quoted, § 860 below. (Wright v. Barnard, 233 Fed. 329, 330, 331.)

§ 841. Amendment of Pleadings to Conform Action to Proper Side of Court—Law or Equity.

§ *274a, Jud. Code, Added by Amendment March 3, 1915, c. 90.* "That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form." (38 Stats. 956; 5 Fed. Stats. Ann., 2d ed., p. 1059; 2 U. S. Comp. Stats. 1916, § 1251a, p. 2023; Waldo v. Wilson (4th Cir.), 231 Fed. 654, 145 C. C. A. 540; Webb v. Southern R. Co. (S. D. Ala.), 235 Fed. 578; National Surety Co. v. United States (6th Cir.), 228 Fed. 577, **L. R. A.** 1917A, 336, 143 C. C. A. 99.)

§ 842. Amendment Setting Up a New Cause of Action Does not Relate Back to Prevent Bar of Statute of Limitations. Where a bill to rescind a sale of land for fraud and to recover incidental damages was transferred to the law side of the court under Equity Rule 22, because the plaintiff has put it out of his power to restore the vendor to his former position, an amended petition claiming damages for the fraud, if allowable, sets up a new cause of action, and did not relate back to the filing of the original bill, so that it was barred where four years had elapsed after the discovery of the fraud before the filing of the amendment. (Friederichsen v. Renard (8th Cir.), 231 Fed. 882, 146 C. C. A. 78.)

§ 843. Motion Should be to Transfer to Law Side Under Rule 22 or to Determine Questions of Law Under Rule 23 and not to Dismiss Under Rule 29. In Goldschmidt Thermit Co. v. Primos Chemical Co. (E. D. Pa.), 216 Fed. 382, at page 383, the court said on a motion to dismiss:

> " . . . as the decree of a chancellor is always of grace, and is never the absolute right of a litigant, the courts will refuse to entertain jurisdiction, where the averments which confer it are wholly colorable, and relief is vainly asked through a purely equitable remedy for the mere purpose of giving jurisdiction, in order to grant other relief which may be obtained at law. In other words, it is not that the courts do not have jurisdiction, but that they refuse to exercise it. The strength of the plaintiff's appeal to have its bill entertained is in its contention that a suit for damages would not enable it to get that to which it is entitled.
>
> "This feature of the case of the plaintiff was recognized in Tompkins v. International Paper Co., 183 Fed. 773, 106 C. C. A. 529, and it there saved the bill from dismissal. It cannot at this stage of the case be found that this is not the situation of the present plaintiff. Thus seems to stand the case without reference to the equity rules. By what token, however, can these rules be ignored? They are directly applicable to the question now raised and disposed of it. Rule 22 expressly provides what shall be done 'at any time it ap-

pears' that the suit should have been brought at law. More than this, Rule 23 commands us not to dismiss a bill on this ground. The case may be proceeded with, and when it appears, if it does develop, that this case should be tried at law and the amount of damages assessed by the verdict of a jury, this may be done."

In Goldschmidt Thermit Co. v. Primos Chemical Co. (E. D. Pa.), 225 Fed. 769, at page 775, the court said on motion to transfer to the law side:

"The administrative policy enjoined upon us by these rules [22 and 23] is not to permit plaintiffs to be hampered by procedure objections on the ground that complaint had been made to the wrong court, but, while preserving to defendants all their rights in the disposition of cases, nevertheless to dispose of them by having them determined by that court to whose decision they are properly subject.

"The spirit and intendment is that the question, by what tribunal the case should be decided is to be determined when the question can be decided in the full light of all the information obtainable. Plaintiff is to have accorded to it its right to equitable relief in form and method of procedure, and the defendant is to be given full protection in the assertion of its right in a proper case to have it submitted to a jury. The question is one to be decided on its merits with no more regard to mere form of procedure than is required, and, whenever it appears that a case brought in equity should have been brought at law, full power is given to make the transfer. It is the experience of every trial lawyer of extensive practice, as well as of every trial judge, that when a case of accounting is about to be submitted to a jury, the suggestion is often forced from the judge, or from counsel, that the accounting should be referred to someone well equipped to render it. If such should turn out to be this case, it would be discovered that a mistake had been made in now transferring it.

"The conclusion reached is this: The defendant is within its rights in insisting upon the case being tried at law, if there is no real ground for a court of equity retaining jurisdiction. This right, however, will remain in the case to be accorded to the defendant at any stage. All that is now de-

cided is that on the face of the record technically a court of equity has jurisdiction, and we cannot find from the record now before us that the averments which confer this jurisdiction are merely colorable, nor can we find at present that the case is one which the defendant is entitled as a matter of right to have tried at law.

"The motion to transfer is therefore dismissed, with leave to defendant to renew it at any time."

§ 844. Rules 22 and 23 Do not Change Mode of Beginning a Suit in Equity. The mode of instituting a suit in equity by filing the bill, etc., has not been changed. Hence a motion to set aside a judgment after the term at which it was rendered could not be treated as a suit in equity and be docketed on the equity calendar, and proceeded with in accordance with the practice and procedure in such cases. (Wellman v. Bethea (E. D. S. C.), 213 Fed. 367.)

§ 845. Equity Suits not Maintainable Where Legal Remedy Adequate.

§ *267, Jud. Code* (*Formerly* § *723, Rev. Stats.*). "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

"The statute (above quoted) is no more than a legislative expression of pre-existing familiar law. As far back as Boyce v. Grundy, 3 Pet. (U. S) 213, 7 **L. Ed.** 655, it was said, and it has been repeated in numerous cases since, including Williams v. Neely, 134 Fed. 10, 69 **L. R. A.** 232, 67 C. C. A. 171, that such statute is merely declaratory of the well-recognized rule that a suit in equity cannot be sustained where there is a plain, adequate, and complete remedy at law. The converse is equally the settled law; that is, if the plaintiff has a justifiable cause and he has no plain, adequate, and complete remedy at law, he must have one in equity. This plaintiff could not maintain an action at law, ejectment, or other similar statutory action, for the plaintiff did not have, at the time

of the filing of the bill, the legal title coupled with the present right to possession." (Continental Trust Co. v. Tallassee Falls Mfg. Co. (M. D. Ala. N. D.), 222 Fed. 694, 702.)

§ 846. What is an Adequate Remedy at Law.

"The same answer has been made to this question by the courts of every jurisdiction, federal and state. It is that the remedy afforded by an action at law must be full, adequate, and complete. Mere existence of a remedy in the sense of the right to bring an action at law will not of itself suffice, but the remedy afforded by the action must be of the character described." (Goldschmidt Thermit Co. v. Primos Chemical Co., 225 Fed. 772.)

§ 847. Necessity of Mixed Character of Remedies Gives Equity Jurisdiction as Legal Remedy Alone is not Then Adequate.

"The application of the principle of reference to the law side of the court is also accompanied with another principle. A case may be of a mixed character respecting the remedies called for, and there may be a commingling of the remedies to which the plaintiff is entitled, some of which may be purely equitable and which can be afforded only through chancery forms of procedure, and others, or at least one other, which may be administered through legal forms.

"The principle then applicable is this: When the right to an equitable remedy exists in a plaintiff and he has filed his bill through and by which a court of equity has taken jurisdiction of his complaint, the court having thus acquired jurisdiction will proceed to a final and full determination of all his rights, notwithstanding the fact that this may involve findings which of themselves could have been made in an action at law. Among these equitable remedies, which are recognized as the right of a litigant to have applied, is the right to an injunction, and in most jurisdictions at least to an accounting, where the accounting is complex and of a character with which a tribunal, made up of a jury, could not be expected to cope. The necessity for discovery also may in itself confer equitable jurisdiction." (Goldschmidt Thermit Co. v. Primos Chemical Co., 225 Fed. 773.)

§ 848. Where Recovery of Money is Only Relief Sought Remedy at Law is Adequate. Where, in a suit by a bankrupt's trustee to recover an alleged preference, the only relief demanded was the recovery of money claimed to have been paid to defendant by the bankrupt under circumstances alleged to constitute a voidable preference, there was a plain, adequate, and complete remedy at law; and hence a bill in equity was not maintainable under Judicial Code, § 267, providing that suits in equity shall not be sustained in courts of the United States in any case where a plain, adequate, and complete remedy may be had at law. (First State Bank of Milliken v. Spencer (8th Cir.), 219 Fed. 503, 135 C. C. A. 253.)

§ 849. Where Account may be Adjusted by Jury Remedy at Law Adequate. An action of ejectment would not be enjoined, and the litigation taken over by a court of equity, on the ground that, if an accounting should be decreed, a court of law would be without jurisdiction, where the defendant in the ejectment action, seeking the injunction, did not concede that there ever would be an accounting, especially where the account was short, and no reason was apparent why it could not be adjusted by a jury. (Weber v. Hertzell (8th Cir.), 230 Fed. 965, 145 C. C. A. 159.)

§ 850. Where Remedy at Law Does not Afford a Practical and Efficient Result Equity may Take Jurisdiction. The district court was held to have had jurisdiction of an amended bill in equity by the holder of bonds issued by a regularly organized state irrigation district, alleging that the directors of the district had made and collected assessments for the payment of interest on the bonds, but had defaulted in interest, and had cast a cloud on the title to the bonds by claiming that part of them had been issued without consideration or without adequate consideration, on the ground of its independent equitable jurisdiction over trustees.

In such case the court held that the district court, though required by Judicial Code, § 267, to deny relief in equity in any case where adequate and complete remedy may be had at law, might take jurisdiction on the ground that the only available action at law to recover the interest due on the bonds as they became due did not afford a practical and efficient result. (Thompson v. Emmett Irr. Dist. (9th Cir.), 227 Fed. 560, 142 C. C. A. 192.)

§ 851. When Legal Remedy Need not be Exhausted to Maintain Creditor's Bill. As a general rule, a creditor's bill to set aside a fraudulent conveyance can be maintained only by one who has reduced his claim to judgment and had execution issued thereon and returned unsatisfied, since the debtor is entitled to a trial by jury as to the correctness of plaintiff's demand, and the remedy at law must have been exhausted and the existence of a lien on the property or interest therein by contract or judgment is required. But, where it was admitted, by a motion to dismiss, that plaintiff's demand was valid, that the debtor was wholly insolvent, and had no property anywhere subject to execution, and had left the state in which the land fraudulently conveyed was situated—plaintiff's failure to reduce his demand to judgment did not defeat his right to sue, since a jury trial is unnecessary where the demand is admitted. The recovery of judgment is dispensed with where it is improper or impossible or would be useless. A judgment in another state would be no better than no judgment as a condition precedent to such suit, and, moreover, a judgment is not a lien on realty fraudulently conveyed; it being the filing of the creditor's bill which creates the lien. (Adler Goldman Commission Co. v. Williams, 211 Fed. 530.)

CHAPTER 38.

ADMINISTERING LEGAL RELIEF IN AN EQUITABLE SUIT.

SEC.
860. The Rule in Equity—No. 23.
861. Illustrations — Specific Performance and Damages — Quiet Title and Possession.
862. Court may Submit Incidental Issues to a Jury.
863. Where Equitable Jurisdiction Wholly Fails, Equity will not Retain Case to Determine Legal Issues.
864. The Rule Does not Permit the Joinder of Legal and Equitable Claims to Make Up the Necessary Jurisdictional Amount in Controversy.

§ 860. The Rule in Equity—No. 23.

Rule 23. Matters Ordinarily Determinable at Law, When Arising in Suit in Equity to be Disposed of Therein. "If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court.

"It is well settled that when equity obtains jurisdiction to administer one of its peculiar remedies, it will afford complete relief, even though to do so may involve the giving of relief which might have been obtained at law." (Bureau of National Literature v. Sells (W. D. Wash.), 211 Fed. 379, 382.)

§ 861. Illustrations — Specific Performance and Damages — Quiet Title and Possession. In a suit by the United States for the specific enforcement of an agreement by a railroad company to execute a stipulation and bond to protect the public interests from loss or injury by reason of the construction and maintenance of its road over a national forest reservation, a court of equity has incidental jurisdiction to award damages for injuries previously caused by defendant to timber in the reservation. (Chicago, M. & St. P. Ry. Co. of Idaho v. United States (9th Cir.), 218 Fed. 288, 134 C. C. A. 84.)

The rule is that a court of equity which has rightfully acquired jurisdiction of a cause will retain it to do complete justice between the parties. In a suit by a mortgage trustee for a cancellation of deeds as a cloud on the title to the mortgaged property, on a finding that the deeds are fraudulent and that defendants are wrongfully in possession, the court will not leave them in such possession, but will decree possession to complainant, although when the suit was commenced it did not have the right of possession under the terms of the mortgage. (Continental Trust Co. v. Tallassee Falls Mfg. Co. (M. D. Ala. N. D.), 222 Fed. 694, 702.)

§ 862. Court may Submit Incidental Issues to a Jury. In Vosburg v. Watts (4th Cir.), 221 Fed. 402, 408, 137 C. C. A. 272, the court held that Rule 23 was not intended to deprive a court of equity of the discretionary right to have its "conscience enlightened" or its work facilitated by referring to a jury some question of fact which is incidental and subordinate to the main contention.

§ 863. Where Equitable Jurisdiction Wholly Fails, Equity will not Retain Case to Determine Legal Issues.

> "While this rule [Rule 23] permits the decision of a matter ordinarily determinable at law in a suit in equity when there remains jurisdiction to grant equitable relief upon the cause of action in suit, it does not authorize such a determination when jurisdiction of the cause in equity has entirely failed, and section 723 of the Revised Statutes [§ 267, Jud. Code] grants to each of the parties the right to the trial of the matter by a jury according to the course of the common law." (Linden Inv. Co. v. Honstain Bros. Co. (8th Cir.), 221 Fed. 178, 181, 136 C. C. A. 121.)

In this case a cause of action for a mechanic's lien failed because there was no showing as required by state law that the party for whose immediate use and benefit the building was erected has some estate or interest in the land. The court refused to allow the case to be retained for a personal judgment against said party.

§ 864. The Rule Does not Permit the Joinder of Legal and Equitable Claims to Make Up the Necessary Jurisdictional Amount in Controversy. A plaintiff having a claim of equitable cognizance of less than $3,000 for enforcement of a lien cannot invoke the jurisdiction of a federal court by joining in a bill of equity seeking to enforce equitable claims separate and distinct legal causes of action for goods sold, and on an account stated entirely disconnected from the equitable claim, sufficient in amount to make over $3,000. (Bucyrus v. McArthur (M. D. Tenn.), 219 Fed. 266, 271, 272.)

In the case last cited the court said:

> Page 271: "The jurisdictional amount involved under the lien claims on the steam shovel is furthermore merely the amount claimed and not the value of the shovel. New England Mortgage Co. v. Gay, 145 U. S. 123, 130, 36 **L. Ed.** 646, 12 Sup. Ct. 815. Obviously, therefore, this court has no jurisdiction under these two claims of an equitable nature, which aggregate only $2,453.05, exclusive of interest, unless in arriving at the jurisdictional amount there can be added one or both of the disconnected legal demands which have been joined in the bill. This is not a case presenting the joinder of different equitable claims in one bill, where the test of the jurisdictional amount is the aggregate of the claims. 1 Street's Fed. Eq. Prac., § 367, p. 213, and cases cited; and Lilienthal v. McCormick (9th Cir.) 117 Fed. 89, 95, 54 C. C. A. 475, in which the plaintiff claimed a lien on the same property, both for the advances and damages, each of these claims, however, being of an equitable nature, involving the enforcement of a lien. Nor is the question affected by Equity Rule 26, which merely authorizes the plaintiff to join in one bill as many causes of action 'cognizable in equity' as he may have against the defendant. Nor does Equity Rule 23, when read in connection with Equity Rule 26, authorize the joinder in a bill in equity of disconnected matters cognizable only at law, this rule obviously relating only to auxiliary matters of legal cognizance which may arise in the determination of an equity cause. . . .
>
> "These matters are entirely disconnected, and if the case remained in court so much of the bill as relates to the third or fourth claims would clearly have to be transferred to the

law side of the court as a separate suit, leaving in the equity suit only the first and second claims. In neither of these two suits, however, would the requisite jurisdictional amount be involved."

Page 272: "I may add, as an illustration of the complexity which would be introduced if a bill of this character could be maintained, that while the equitable portion of the bill relating to liens claimed on the steam shovel may well be one of such 'a local nature' that a subpoena could be directed to the marshal of the Eastern District of Tennessee, where the defendant resides, under section 54 of the Judicial Code, or that at least the defendant could be brought before the court by substituted service of process, under section 57 of the Judicial Code, the legal claims set forth in the bill appear to be of a purely transitory character. And since the defendant does not reside within this district and does not appear to be within the district, there is no provision of law by which he could be summoned to appear and make defense to so much of the bill as relates to these transitory causes of action. The marshal of this district in which the suit is brought would, of course, be powerless to serve a subpoena upon the defendant outside of this district; while, to this extent, the action being of a transitory character, there would be no authority, statutory or otherwise, for the service of a writ of subpoena by the marshal of the Eastern district or for substituted service in that district."

CHAPTER 39.

MOTION TO DISMISS IN POINT OF LAW.

SEC.

880. Motion to Dismiss Under Equity Rule 29.
881. Applies to Bankruptcy Cases.
882. Admits Allegations of Bill Well Pleaded.
883. A Motion to Dismiss is in Effect a Demurrer, Evidence not to be Considered.
884. Same—Defense of Another Suit Pending cannot be Raised on Motion to Dismiss.
885. Same—Defense of Special Statute of Limitations not Allowed on a Motion to Dismiss.
886. Motion to Dismiss—Nonjoinder.
887. Defense in Bar Set Up on Motion to Dismiss.
888. Motion to Dismiss on Ground of Laches.
889. Judicial Notice in Aider of Motion to Dismiss.
890. Motion to Dismiss on Plaintiff's Answers to Interrogatories.
891. Illustration of Motion to Dismiss.

§ 880. Motion to Dismiss Under Equity Rule 29.

Part Equity Rule 29. "Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer, or plea, shall be made by *motion to dismiss* or in the answer. . . . If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered." (Quoted in full § 900, *post.*)

§ 881. Applies to Bankruptcy Cases. A court of bankruptcy is an equity court, and subject to new Equity Rule 29, abolishing demurrers in equity suits. (Pollack v. Meyer Bros. Drug Co. (8th Cir.), 233 Fed. 861, 147 C. C. A. 535.)

§ 882. Admits Allegations of Bill Well Pleaded. A motion to dismiss a bill in equity admits all the allegations of the bill which are well pleaded. (Johnson v. Chicago, M. & St. P. Ry. Co. (W. D. Wash. N. D.), 224 Fed. 196, 200; Fordham v. Hicks (S. D. Ga. W. D.), 224 Fed. 810, 811.)

> "On motion to dismiss a bill, its averments must be treated as true, the same as in case of a demurrer." (Lowenthal v. Georgia Coast & R. R. Co., 233 Fed. 1010.)

§ 883. A Motion to Dismiss is in Effect a Demurrer, Evidence not to be Considered. A demurrer, filed prior to February 1, 1913, was sustained subsequent to that date. Where the record did not show when it was submitted, it would be assumed, on appeal, either that it was submitted before February 1, 1913, or that the court treated it as a motion to dismiss. (Weber v. Hertzell (8th Cir.), 230 Fed. 965, 145 C. C. A. 159.)

> "The motions to dismiss were filed under Rule 29 of those in force February 1, 1913, and have the force and effect of demurrers. In the consideration of such motions the court cannot consider affidavits filed by defendants on disputed questions of fact. This additional difficulty is met with at the outset that, while many affidavits were introduced and are in the record offered by both the complainant and defendants, they were offered on the application for a temporary injunction and not on the motion to dismiss.
>
> "Inasmuch as it seems desirable that the court first pass on the motions to dismiss, the court, in considering them, can only consider the third amended and supplemental bill, including, however, the exhibits incorporated therein and such additional matters as are conceded by the complainant." (Central Trust Co. of New York v. Denver & R. G. R. Co. (8th Cir.), 219 Fed. 110, 113, 135 C. C. A. 12.)

In considering the motion the pleadings alone are involved. (Hosler v. Ireland, 219 Fed. 490, 491, 135 C. C. A. 201.)

The proposition must be absolutely clear that taking the allegations of the bill to be true, it must be dismissed at the hearing. (Ralston Steel Car Co. v. National Dump Car Co. (D. Maine), 222 Fed. 590.)

§ 884. Same—Defense of Another Suit Pending cannot be Raised on Motion to Dismiss.

"Under the old rules these facts would be raised by a plea in abatement, and to sustain it would require evidence. Special pleas of abatement are now abolished by Equity Rule 29, but may be set up in the answer. In any event the plea would be bad. This court had that question before it a short time ago in Falls City Construction Co. v. Monroe County, 208 Fed. 482, and it is unnecessary to repeat the reasons why such a plea is not good." (Adler & Goldman Commission Co. v. Williams, 211 Fed. 530, 532.)

§ 885. Same—Defense of Special Statute of Limitations not Allowed on a Motion to Dismiss.

"It is to be noted that, while this rule requires that every defense heretofore presentable by plea in bar or abatement shall be made by answer, it is not every defense in point of law arising upon the face of the bill that heretofore was available on demurrer that can be disposed of on motion without answer. The proposed defense could have been pleaded in bar of the complainant's action and disposed of in advance of the principal case, at the discretion of the court. It cannot, however, be disposed of on motion, without answer, because it does not involve misjoinder or nonjoinder, and is not based on an insufficiency of fact to constitute a valid cause of action in equity—the only grounds upon which a bill of complaint may be dismissed without answer. The bill alleges every fact necessary to constitute a valid cause of action in equity, as well as the reasons for the lapse of time in bringing suit. In such a situation, a statute (no longer existing) which, while in force, did not impair the cause of action to which it related, but only limited the time within which an action to enforce it could be brought, should be pleaded, with pertinent statements of fact making it applicable to the case made out by the bill.

"The motion to dismiss is denied." (Tilden v. Barber (D. N. J.), 227 Fed. 1010, 1011.)

§ 886. Motion to Dismiss—Nonjoinder.

"The defendants have filed a motion to dismiss the suit on the ground of nonjoinder of parties, because the bill shows that Rogers was jointly interested with Viets and Bancroft in the agreement of May 5, 1913, for the purchase and sale of the timber land. Viets, Bancroft, and Rogers are named as the parties of the one part to said agreement, while the Maine Land & Lumber Company, one of the defendants, is named as the other party to said agreement. Defendants also moved to dismiss the complaint because Rogers still has a united interest with the other two in the subject matter of this suit, and that therefore it was necessary and indispensable that Rogers be made a party plaintiff to this cause, and as he is now, and was at the time this suit was brought a citizen of Connecticut, the necessary diversity of citizenship required to give this court jurisdiction does not exist.

"In addition to this reason for dismissal, the defendants, in their motion, have set up other claims which need not be noticed here, as the motion to dismiss must be granted for nonjoinder of parties.

"In case the plaintiffs bring a suit in the state court, based upon a bill of complaint like that set out in this action, the defendants may then raise, by demurrer or otherwise, the other questions which they have herein presented in their motion to dismiss, at which time such questions may be heard and determined." (State of Maine Lumber Co. v. Kingfield Co. (Conn.), 218 Fed. 902, 904.)

"Where a motion to dismiss is made for a defect in the pleadings, and a hearing is had in advance of the trial, the motion must be considered on the complaint alone; and hence, where defendant answered, alleging nonjoinder of an indispensable party, and it was necessary to invoke the record in another case to show the necessity for joining such party, a motion to dismiss would not be heard in advance of the trial, but the issue would be heard and determined before the taking of testimony on the main issue." (Bogert v. Southern Pac. Co. (E. D. N. Y.), 211 Fed. 776.)

§ 887. Defense in Bar Set Up on Motion to Dismiss. Under Rule 29, in a suit for infringement, the defense that defendant is

a contractor with the government for the articles infringing a patent and for that reason is protected by Act June 25, 1910, c. 423, may be set up by motion to dismiss. (Marconi Wireless Telegraph Co. v. Simon (S. D. N. Y.), 227 Fed. 906, 908.)

§ 888. Motion to Dismiss on Ground of Laches. Under Rules 25 and 29, when laches is apparent on the face of the bill, it may be taken advantage of by motion to dismiss, which is equivalent to a demurrer. (Alexander v. Fidelity Trust Co. (E. D. Pa.), 215 Fed. 791.)

In the case last cited the court said:

> "It is clear that these rules change only the manner of raising such questions, and neither the questions themselves nor the equitable principles by which they are to be determined."

§ 889. Judicial Notice in Aider of Motion to Dismiss. Demurrers under the old practice and motions to dismiss under the new can only be sustained in matters of judicial notice in a very clear case. (United States v. Mackey (8th Cir.), 216 Fed. 126, 132 C. C. A. 370.)

§ 890. Motion to Dismiss on Plaintiff's Answers to Interrogatories.

> "The procedure under Equity Rule 58, as followed in this case, was sanctioned by this court in Bronk v. Charles H. Scott Co., 211 Fed. 338, 128 C. C. A. 17, where it said:
>
> " 'If the decree cannot be sustained by an application of the law to the facts admitted by appellant in her bill and in her answers to appellee's interrogatories, the cause must be remanded for trial in due course. Undoubtedly the purpose of authorizing interrogatories was to enable the court to make a summary disposition of a cause by applying the law to an admitted state of facts; but, when the facts are not admitted, neither that rule nor any other warrants a summary disposition on affidavits or other untested showings by the party moving for the summary disposition, in lieu of proofs duly taken with proper opportunity for the adversary to cross-examine.'

"In the instant case no question arises of the validity of the patent in suit. . . . The defense of noninfringement is the only one which this record raises. The bill broadly and aptly charges infringement, and is upon its face entirely sufficient. To dismiss it on motion would be unwarranted, unless from the answers to the interrogatories it so clearly appears that the defendant did not infringe the patent in suit that the court can say that under no admissible evidence which might by any possibility exist can the conclusion of noninfringement be avoided." (Asbestos Shingle, Slate & Sheathing Co. v. Asbestos Shingle Co. (7th Cir.), 239 Fed. 539, 541, 152 C. C. A. 417.)

§ 891. Illustration of Motion to Dismiss.

"Defendant has moved the court to dismiss the bill, upon the ground that the facts stated therein are insufficient to constitute a valid cause of action in equity, in that the release signed by plaintiff relates to personal injuries and a satisfaction of the damage and claim for personal injuries occurring March 5, 1910, and that plaintiff's cause of action, if any, for injuries received on that date, accrued at that time, and that the law action commenced by plaintiff is barred by section 159 of Remington & Ballinger's Code of Washington, which provides that an action for an injury by one person of another must be commenced within three years from the date of the accrual of the cause of action." (Johnson v. Chicago, M. & St. P. Ry. Co. (W. D. Wash. N. D.), 224 Fed. 196, 197.)

FORM—MOTION TO DISMISS.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

In Equity—No. ——.

——, Corporation, Plaintiff,
v.
——, Incorporated, a Corporation, Defendant.
} Motion to Dismiss.

Now comes ——, Incorporated, a corporation, the defendant in the above-entitled action, and moves the court to dismiss this action and that it takes its costs in this suit incurred for the following reasons:

I.

Because it appears in the complaint filed in this cause that a certain indispensable party defendant, to wit, ——, the lessor in the lease described, is a citizen of the same state as the state in which the plaintiff is a citizen, and therefore no diversity of citizenship exists as alleged and upon which basis the court is alleged to have jurisdiction.

II.

That there is insufficiency of fact to constitute a valid cause of action in equity against the defendant.

III.

That there is a nonjoinder of an indispensable party, to wit, ——, the lessor in the lease set out in the complaint.

——, Solicitor for Defendant.

——, Of Counsel.

FORM—DECREE DISMISSING.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

In Equity—No. ——.

——, Corporation, Plaintiff,
v.
——, Incorporated, a Corporation, Defendant.

DECREE DISMISSING SUIT ON DEFENDANT'S MOTION TO DISMISS.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, on the —— day of ——, 1917, the Honorable ——, District Judge, announced his decision, and caused a minute entry thereof to be made as follows:

"This cause having heretofore been submitted to the court for its consideration and decision on defendant's motion to dismiss the bill of complaint; the court, having duly considered the same, and being fully advised in the premises, now announces its conclusions thereon, and it is accordingly ordered that said motion of defendant to dismiss the bill of complaint be, and same hereby is granted."

It is, therefore, ordered, adjudged and decreed as follows, viz:

That defendant's motion to dismiss be sustained, and that this cause be and hereby is dismissed, and that defendant recover from plaintiff its costs herein expended.

——, District Judge.

O. K. as to form.

——, Solicitors for Plaintiffs.

CHAPTER 40.

ANSWER AS A PLEA.

SEC.

900. The Equity Rule—No. 29.
901. Separate Hearing of Answer as a Plea.
902. Answer as a Plea may be Disposed of Either as an Issue of Law or of Mixed Law and Fact.
903. Answer as a Plea Should also Show Defendant's Other Defenses—Should Set Out Defendant's Whole Defense.
904. On Sustaining of Plea Court Will Dismiss the Bill.

§ 900. The Equity Rule—No. 29.

Equity Rule 29. "(*Defenses — How Presented.*) Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered." (3 U. S. Comp. Stats. 1916, § 1536, p. 2508; Foster's Federal Practice, 5th ed., pp. 455, 458, 485, 508, 562, 623, 630, 765, 786, 836, 1118, 1174; Simkins' Federal Equity Suit, 3d ed., pp. 128, 129, 200, 204, 261, 296, 301, 310, 311, 362, 375, 386, 394, 395, 398, 399, 402, 404, 405, 407, 411, 412, 414, 416, 418, 419, 421, 426, 431, 442, 452.)

§ 901. Separate Hearing of Answer as a Plea. Under Rule 29, motion to dismiss will be denied where the case is on the calendar, and defendant invokes the record of other cases in such a way

that they must be treated as proofs. But upon the call of the case the plea will be heard upon such record as may be offered before taking testimony in support of the main issue. (Bogert v. Southern Pac. Co. (E. D. N. Y.), 211 Fed. 776.)

§ 902. Answer as a Plea may be Disposed of Either as an Issue of Law or of Mixed Law and Fact.

"Demurrers are now abolished by Rule 29. The question of whether the bill on its face avers such facts as 'constitute a valid cause of action in equity' can now be raised by a 'motion to dismiss' the bill, or it may be raised in the answer. Under Rule 29, when raised by motion to dismiss, the motion may be set down for hearing upon five days' notice. When raised by answer, it may be disposed of by the court as a matter of pleading, or a trial question, in the discretion of the court. In this case the question has been raised by answer.

"It has thus been taken out of the domain of questions of pleading and has been transferred to the domain of trial questions. This does not preclude the respondents at the trial of the case from raising the question at the outset as if it were a question of pleading, for the reason that it would be idle to go on with the trial of the case when the result of it could be determined at the outset.

"There is a distinction, however, between disposing of the question as a trial question and disposing of it as a question of pleading either on a demurrer, as under the old practice, or on a motion to dismiss, under the present practice. The distinction is this: Cases disposed of upon demurrers in form must necessarily be decided according to the record as it then stands, and the same thing is true of a motion to dismiss under the present rules. When the question is raised as a trial question, then, as on all questions of like character raised in the trial of the case, the plaintiff may move to amend his record, and if the amendment is allowed, and no surprise is pleaded, the trial proceeds upon its trial merits without regard to the old state of pleadings. The distinction referred to, therefore, involves a right of the complainants, which is, or at least may be, of very great practical value." (Alexander v. Fidelity Trust Co. (E. D. Pa.), 214 Fed. 495, 497.)

On motion for a preliminary injunction which was granted, questions of law as to exoneration and a principle of governmental policy were raised. The court in discussing future disposition of the case in the pleadings said, page 299:

"As demurrers in equity have been abolished, the real question intended to be raised by the defendants can be raised only under Rule 29. This must be either on motion called up and disposed of in the discretion of court, or on motion set down for hearing upon five days' notice. If counsel representing all the parties are in accord upon the suggestion that the case be finally disposed of as if upon demurrer, they may by stipulation, or by conforming strictly with the requirements of Rule 29, put the case in formal shape to be finally ruled." (Southwestern Surety Ins. Co. v. Wells (E. D. Pa.), 217 Fed. 294.)

§ 903. Answer as a Plea Should Also Show Defendant's Other Defenses—Should Set Out Defendant's Whole Defense.

"On motion by complainants under Equity Rule 29 for decision of points of law in respect to the cause or causes of action stated in the bill, raised by portions of the answer of defendants or some of them. Motion granted." (Boyd v. New York & H. R. Co. (S. D. N. Y.), 220 Fed. 174, 175.)

Page 178: "The pleadings are under the equity rules of February 1, 1913, and each answer contains matter tendering issues of law. Complainants have thereupon made this motion.

"The matter specified in the notice of motion may in part be described with accuracy, in terms of the old practice. The Central has demurred generally to the whole bill.

"All the defendants have asserted by answer that private complainants cannot in this form of action avail themselves of the prohibitions of the Sherman Act, and all assert that the consolidation of the Harlem and Central is not within the purview of the statute. With some hesitation I think these contentions would formerly have been raised by motion to expunge.

"These probable equivalents are referred to only as aids in passing from old to new; for, if the modern practice is worthy of acceptance, its excellence will not arise from doing only

the old things under new names. The new method must show itself a better, quicker, more far-reaching instrument for ascertaining truth; otherwise it were folly to trouble ourselves with new names.

"There is nothing novel in embodying and presenting legal propositions in an answer, and the points thus presented may be every degree of importance.

"What is new is the obligation on defendant to show all his propositions at once, whether of fact or law, and let opponent and court consider whether, in view of the facts alleged, any of the legal theories propounded can profitably be considered before testimony taken; or by taking merely such evidence as has heretofore been often adduced in support of a plea.

"Evidently this casts a burden upon judicial discretion hitherto unknown. Many a judge has heard in succession a demurrer, a plea or two, and several motions before getting to an answer, and never seen, nor thought he had a right to see, the whole defense at a glance. Whether the panorama now afforded is real reform depends almost altogether on how sympathetically and skillfully the new procedure is administered. That early efforts will sometimes be mistakes is to be expected.

"This case affords opportunity and imposes necessity of considering at least two points, which are of importance to the scheme of procedure, and not merely in this litigation: (1) Where an answer asserts that the bill states no case, can any fact allegations of defendant's pleading be considered? (2) When defendants raise legal propositions going to less than complainant's whole case, what test can be suggested to guide the court in deciding whether to consider or decline the points in advance of final hearing?

"On the first point, it seems to me clear that, when defendant alleges that complainant shows no case at all, he cannot complain if the court considers any admission or allegation of the answer which explains or enlarges (but does not contradict) the bill of complaint.

"One who 'demurs generally' nowadays must be understood to do so, not only on what complainant shows, but also after having had his own conscience purged. Thus only is avoided the old and bad habit of trying everything else before stating facts.

"Similarly, where one defendant demurs after stating his own actions or position, and other defendants deny knowledge regarding the first defendant, any relief to which complainant is entitled on the statement of No. 1 will not be stayed by his fellow's lack of knowledge.

"For these reasons I have above recited the Central's admissions as to consolidation, and feel free to act on them, notwithstanding the ignorance of the other answers.

"On the second query, I am of opinion that no legal point (going to less than the whole case) should be decided in advance of final hearing, unless such decision will add to or eliminate from the case a clearly defined and easily stated mass of testimony, the presence or absence of which will not change or affect the method of presenting the other aspects of the litigation.

"Applying this to the case at bar, it seems advisable now to pass upon the applicability of the Sherman Act, because the propositions of complainant evidently require much expensive fact evidence for ultimate solution, which (if defendants are right) it will be useless to prepare and present." (Boyd v. New York & H. R. Co. (S. D. N. Y.), 220 Fed. 174, 178, 179, 180.)

§ 904. On Sustaining of Plea Court will Dismiss the Bill.

"The district court sustained the pleas to the jurisdiction as to the cause of action based on trademark and unfair competition, but allowed a replication to be filed to the plea in respect to the cause of action on infringement. This was the proper practice under old Rule 33, then in force. The issue on the plea was tried and the court sustained the plea and dismissed the bill. This is the proper practice under new *Rule 29.*" (W. S. Tyler Co. v. Ludlow-Saylor Wire Co. (2d Cir.), 212 Fed. 156, 129 C. C. A. 12.)

CHAPTER 41.

TO OBTAIN FURTHER AND BETTER STATEMENT OR PARTICULARS.

SEC.

920. Definiteness and Certainty—Rule 20.
921. Bill of Particulars.
922. Is a Matter of Discretion.
923. Cannot be Used to Obtain Information of Facts Which are Matters of Expert Testimony.
924. Can be Used to Narrow the Issues by Requiring Defendant to Particularize.

§ 920. Definiteness and Certainty—Rule 20.

Equity Rule 20. "(*Further and particular statement in pleading may be required.*) A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just." (3 U. S. Comp. Stats. 1916, § 1536, p. 2502; Foster's Federal Practice, 5th ed., pp. 485, 788; Simkins' Federal Equity Suit, 3d ed., pp. 275, 355, 359, 436, 454.)

§ 921. Bill of Particulars. Where defendants believe that they cannot safely proceed to trial without a more complete statement of complainants' alleged grievances, a bill of particulars may be required as provided by Equity Rule 29. (Williams v. Pope (W. D. N. Y.), 215 Fed. 1000.)

§ 922. Is a Matter of Discretion.

"A rule for a bill of particulars is an appeal to the discretion of the court, and this appeal will be granted or refused according to the circumstances." (Gimbel Bros. v. Adams Express Co. (E. D. Pa.), 217 Fed. 318.)

§ 923. Cannot be Used to Obtain Information of Facts Which are Matters of Expert Testimony. Plaintiff and defendant each entered motions for further particulars of answer and bill. The court said:

"The motion of the plaintiff is likewise overruled. Where the answer sets up the existence of some concrete thing which may be made the subject of an exhibit as a publication, drawing, photograph, or device which is claimed to be an anticipation of the patented device, and which is proposed to be made the subject of expert testimony, the plaintiff may fairly ask to have it submitted in advance to the inspection of expert witnesses for the plaintiff. If a request for opportunity to make this inspection be denied, or if what is offered in evidence differs from what was submitted for inspection, the present rules furnish the means of preventing a plaintiff from being taken by surprise.

"Rule 48 would furnish all the information which could fairly be asked, and there would seldom be occasion to resort to it. The discretion of the trial judge can readily afford all the additional protection required." (Todd v. Whitaker (E. D. Pa.), 217 Fed. 319, 320.)

§ 924. Can be Used to Narrow the Issues by Requiring Defendant to Particularize. In sustaining a motion to require defendant to make its answer more definite and certain, the court said:

"This cause came on for hearing upon the motion of the plaintiff that the defendant be required to make its answer more definite and certain, by setting forth in what respects each of the patents pleaded by reference in paragraph 8 of the answer discloses any of the elements or combinations of elements described in plaintiff's letters patent, and in what respect they negative the novelty and invention of the device shown and described in complainant's letters patent set forth in the bill of complaint.

"This court is in entire sympathy with this motion, believing, as we do, that the pleading objected to by the motion does not conform to the provisions of Equity Rule No. 30, requiring the defendant in its answer to set out its defense to each claim asserted by the bill in short and simple terms. It seems to me to be the purpose of rule to establish in equity cases substantially the rule of pleading provided by such Codes as that of the state of Ohio, the requirement of which with respect to the answer in a case either at law or in equity is that it shall contain a general or specific denial of each material allegation controverted by the defendant, and a state-

ment in ordinary and concise language of any new matter constituting a defense, counterclaim, or setoff.

"It is the practice in patent cases for counsel to refer to a great number of patents as showing the state of the prior art upon which the claims of invalidity and limited scope of the patent sued upon are based, and when the case comes to trial it is usual to find counsel relying upon only a very small number of such patents, and often upon one, or at most a few of the many features contained in them. . . .

"It is plain that from this manner of pleading it results that a trial court has no guide whatever, when hearing oral testimony, for determining what is relevant and what not relevant to the issue, when the state of the prior art is relied upon as a defense. It is obvious, also, that under the former practice there were means of defining the issues before the hearing which do not exist under the new practice, and I am convinced that it was the purpose of the new rules to require that counsel shall so study the patents upon which they intend to rely that in their pleadings they can state in short and simple terms just what they claim with respect to them, rather than to defer such study until after a record is made up of volumes of irrelevant matter, and then, by study and analysis, to pick out what is essential to a decision of the case.

"Counsel defending against this motion say that the practice followed in this answer conforms to the practice which has prevailed in this court for more than a score of years. This is no doubt true, but the very purpose of these new equity rules is to change this former practice, because it has been found to be expensive to litigants, burdensome to courts, and a fruitful source of delay of justice. It is also urged that it is for the court to determine whether the patents referred to, or any of them, by their disclosures negative novelty or invention. With this the court cannot agree, but is of opinion that it is for the court to determine whether the claims properly made in the pleadings in a case with respect to patents referred to negative novelty or invention, and that the new rules require this changed manner of pleading, to the end that such claims shall be more clearly defined in the pleadings than heretofore, so that, when cases are called for trial in open court, both judge and counsel may be definitely advised as to just what the claims of the respective parties are.

"Counsel . . . contend that until the plaintiffs shall so far disclose their position that the defendant may know whether

they intend to claim that all of the parts in the construction involved are old, but that the combination itself is new, or whether they intend to contend that the claims of the patent relied upon are valid, because they specify either some new element or some new form of an old element, etc., the defendant should not be required to specify what particular defensive patent will be relied upon, or what particular thing in the evidence of the prior art will be relied upon as the final reason that the claims of the plaintiff's patent are invalid.

"To this claim of counsel the answer suggests itself that the timely interposing of a motion might have secured a sufficient definition of the claims of the plaintiffs in the bill to have enabled the defendant to know just what case it is to meet. This court cannot refrain from observing in this connection that the old notion that a suit at law or in equity is chiefly a game affording an opportunity for the matching of wits of counsel and for the exercise of the ingenuity of courts is fast giving place to the conception that suits both at law and in equity should be sincere and candid attempts to reach the real point of difference between the parties to them, and to secure a just settlement of such difference.

"With this now current conception of a suit in equity in mind, it seems to this court that the application of the new equity rules to patent cases should command the cordial support and assistance of the bar, without which, of course, judges will be in large part powerless to give them full effect. It may be that there is much in the claim often made that the new equity rules cannot be successfully applied to pleading in patent cases, but several judges throughout the country, notably in the Southern district of New York and in Massachusetts, are making a determined effort to give the application of them to such cases a fair trial. With this effort this court is in entire sympathy, both from its conviction that it is its duty to give effect to these rules prescribed by the Supreme Court of the United States, and also because of its conviction that their application to such cases will greatly curtail the extent of records made up in them, and so the expense to litigants, and will result in a genuine reform, leading to a more prompt decision of cases, and also to a larger measure of justice in the determination of them. Delay of decision and excessive cost often defeat justice." (Coulston v. H. Franke Steel Range Co. (N. D. Ohio E. D.), 221 Fed. 669.)

CHAPTER 42.

STRIKING OUT REDUNDANT, IMPERTINENT OR SCANDALOUS MATTER UNDER RULE 21.

SEC.

930. Striking Out—Rule 21.
931. Illustration of Impertinent Matters.
932. Illustration of Scandalous Matters.
933. Error in Striking must be Corrected by Appeal and not by Mandamus.

§ 930. Striking Out—Rule 21.

Equity Rule 21. "(*Scandal and impertinence.*) The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, *upon motion* or its own initiative, order any redundant, impertinent, or scandalous matter stricken out, upon such terms as the court shall think fit." (3 U. S. Comp. Stats. 1916, § 1536, p. 2502; Foster's Federal Practice, 5th ed., pp. 786, 808; Simkins' Federal Equity Suit, 3d ed., pp. 310, 348, 423, 434.)

Under Equity Rule 21 exceptions to pleadings for scandal or impertinence no longer obtain, but such matter may be stricken out by the court. (Williams v. Pope (W. D. N. Y.), 215 Fed. 1000.)

§ 931. Illustration of Impertinent Matters. In a suit for infringement of letters patent, the defendant pleaded in its answer as a defense and as a counterclaim damages for unfair conduct of the complainant in respect to other patents; threatening of defendant's customers and a conspiracy in violation of the Sherman Law. This was claimed the right to do under new rule in equity 30, but Judge Veeder in the District Court, upon complainant's motion, struck these sections out of the answer as being impertinent. (Lovell-McConnell Mfg. Co. v. Bindrim (2d Cir.), 219 Fed. 533, 534, 135 C. C. A. 283. See, also, Nikola Tesla Co. v. Marconi Wireless Tel. Co. (S. D. N. Y.), 227 Fed. 903, 904.)

§ 932. Illustration of Scandalous Matters.

"Where a bill charged fraudulent conduct against an attorney, without stating any facts to support the charge, such charge is scandalous, and should be stricken from the bill." (Crim v. Rice (2d Cir)., 232 Fed. 570, 146 C. C. A. 528.)

§ 933. Error in Striking must be Corrected by Appeal and not by Mandamus. Equity Rule 21 abolishes exceptions, but authorizes the court, either upon motion or of its own initiative, to strike out impertinent matter, and a mistake in doing so is one of law which can be corrected only by appeal from the final decree and not by mandamus. (Lovell-McConnell Mfg. Co. v. Bindrim (2d Cir.), 219 Fed. 533, 535.)

CHAPTER 43.

DISCOVERY.

SEC.
940. The Equity Rule—No. 58.
941. Alters Procedure not Principles of Discovery.
942. Not a Part of the Pleadings and Waiver of Answer Under Oath Does not Relieve from Answering Interrogatories.
943. General Prayer for Discovery in Bill not Sufficient — Interrogatories Should be Filed.
944. Purpose of Rule 58 is to Obtain Discovery of Facts Material to Plaintiff's Case or to Defendant's Defense, not Evidentiary Matters, nor a Bill of Particulars.
945. Matters Disclosed in the Answer Material to Plaintiff's Case are Subject to Interrogatories.
946. Interrogatories as to Writings as a Basis for Call for Productions.
947. Best Evidence Rule Applicable to Interrogatories.
948. Interrogatories may not be Used to Discover Evidence.
949. Interrogatories may not be Used to Require Opinion nor Expert Testimony.
950. Interrogatories may Test Contested Infringement.
951. A Witness is not Subject to Interrogatories.
952. As to Form of Objections to Interrogatories.

§ 940. The Equity Rule—No. 58.

Equity Rule 58. "*(Discovery — Interrogatories — Inspection and production of documents—Admission of execution or genuineness.)* The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

"If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit.

"Copies shall be filed for the use of the interrogated party and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party if there be no record solicitor.

"Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully and the answers shall be in writing, under oath, and signed by the party or corporate officer interrogated. Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

"The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

"By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable." (3 U. S.

Comp. Stats. 1916, § 1536, p. 2520; Foster's Federal Practice, 5th ed., § 348, p. 1120; Simkins' Federal Equity Suit, 3d ed., pp. 292, 390, 498, 507, 520, 525.)

§ 941. Alters Procedure not Principles of Discovery.

"Equity Rule 58 is not intended to change the substantive rules of equity as to discovery, but merely to alter procedure, and the interrogatories authorized thereunder are such only as tend to establish complainant's case." (Speidel Co. v. N. Barstow Co., 232 Fed. 617.)

§ 942. Not a Part of the Pleadings and Waiver of Answer Under Oath Does not Relieve from Answering Interrogatories. Under Equity Rule of Practice 58, providing for the filing of interrogatories by either party at any time after filing the bill or answer, and not later than twenty-one days after the joinder of issue, for discovery from the party of facts and documents necessary to the support or defense of the cause, when construed with the rules prescribing the pleadings, and in view of the recognized purpose of the rules to simplify pleading and expedite the taking of testimony and the final hearing, the interrogatories are no longer part of the pleadings, as they formerly were, and a waiver of oath to the answer does not relieve the defendant from answering the interrogatories. (Luten v. Camp (E. D. Pa.), 221 Fed. 424.)

In the case last cited the court said:

"The purpose of Rule 58 was to provide for a simple practice equally open to either party for interrogating the other without such interrogatories becoming part of the pleadings."

§ 943. General Prayer for Discovery in Bill not Sufficient—Interrogatories Should be Filed.

"Rule 58 provides for discovery upon filed interrogatories. I cannot see that any question of discovery is involved upon the present motion merely by reason of the fact that there is a general prayer for discovery in the bill." (Webb v. Samuels (S. D. N. Y.), 227 Fed. 948.)

§ 944. Purpose of Rule 58 is to Obtain Discovery of Facts Material to Plaintiff's Case or to Defendant's Defense, not Evidentiary Matters, nor a Bill of Particulars.

"Under this rule [58] the plaintiff's right of discovery extends only to facts resting in the knowledge of the defendant or documents in his possession material to the support of the plaintiff's case; and the defendant's correlative right of discovery, only to facts and matters material to his defense; and neither is entitled to discovery of an inquisitorial character as to the ground of action or defense of the other; although as theretofore, the right to such discovery as to matters material to the cause of action or defense of the interrogating party will not be defeated by the fact that such matters also involve the ground of defense or action of the interrogated party.

"This construction of the rule is, I think, emphasized by the fact that the plaintiff is given the right to file interrogatories at any time after his bill is filed, although the answer may not have yet been filed, and at a time when the interrogatories can relate only to his own cause of action; while, on the other hand, the defendant is given no right to file interrogatories until after his answer has been filed, thus indicating that the discovery to which he is entitled is to relate to the ground of defense set forth in the answer, and not to the plaintiff's cause of action, as to which the interrogatories might have been filed before the answer, if such right had been contemplated by the rule. Furthermore, the concluding phrase in the language of the rule as above quoted, providing that the court or judge may make such orders as may be appropriate to enforce answers to interrogatories or the production of documents 'in the possession of either party and containing evidence material to the cause of action or defense of his adversary,' clearly shows, from its grammatical construction, that the matters as to which a discovery may be obtained must be material to the cause of action or defense of the interrogating party, the 'adversary' clearly referred to in the rule.

"This construction of the rule furthermore finds strong support by analogy, in the fact that under state statutes authorizing the examination of parties before trial at the instance of the adverse party, operating as a substitute for

discovery in equity, such examination will not be permitted to enable the examining party 'to ascertain the evidence on which the opposite party bases his cause of action or defense, or to ascertain the names of his witnesses, or for the purpose of aiding the party in the preparation of his case for trial.' 14 Cyc. 342; and cases cited in notes 37, 38 and 39.

"So under statutes providing for the production of books or papers of the adverse party, production will not be permitted to enable a party 'to ascertain the evidence on which his opponent's action or claim rests, unless the claim is made that they are forgeries and the inspection is sought to enable the party to prove that fact.' 14 Cyc. 371, and cases cited in notes to 59 and 60. 'But where the books or documents are material to the case of the applicant, it is no objection to their production or inspection that they relate also to the case of his adversary.' 14 Cyc. 371, and cases cited in note 6.

"This construction of the rule is not, as I view it, in conflict with the decisions in Luten v. Camp, 221 Fed. 424, and Blast Furnace Appliances Co. v. Worth Bros. Co., 221 Fed. 430, in which the discovery allowed related directly to facts and documents within the knowledge or possession of the interrogated party, which were material to the ground of action or defense of the interrogating party. And taking this view of the rule I cannot agree in the correctness of the doctrine which may apparently be implied from the opinions in Bronk v. Scott Co. (7th Cir.), 211 Fed. 338, 128 C. C. A. 17, and P. M. Co. v. Ajax Rail Anchor Co., 216 Fed. 634, to the effect that under this rule either party may require discovery as to the nature of his adversary's case, the claims which he makes in regard thereto and the facts supporting it. These cases apparently proceed, in part at least, upon the implied theory that the object of the rule is to enable either party to obtain a more definite statement of the other's case and greater particularity as to the claims upon which he intends to rely; whereas I am constrained to conclude from the language of the rule itself that it was not intended to serve as a provision for requiring further particulars, which is covered by the 20th Equity Rule, but to accomplish the very different purpose of enabling either party to obtain discovery of facts and documents material to his own case which are within the knowledge or in the possession of the adverse party.

"The second, third, and fourth interrogatories inquire as to the opinion of the complainant as to the construction of the patent. This is a matter to be supplied by expert testimony in support of the contention of infringement, or the validity of the patent, or both. It is a matter purely evidentiary, and one which within the English rule, and the proper construction of Rule 58 cannot be inquired into. The same considerations apply to interrogatories 5, 6, and 7, inquiring whether complainant has manufactured devices under its patent, whether it has any interest in other patents, and whether it considers defendant's device to infringe any such other patents. These questions all relate to evidence of circumstances or facts tending to prove some contention of defendant, supposedly the one set up in the sixth paragraph of the answer, which is to be struck out. The eighth and ninth interrogatories, inquiring whether complainant contemplates bringing other patent suits, and whether it had knowledge of one of the letters pleaded in the answer, should be treated in the same way." (P. M. Co. v. Ajax Rail Anchor Co. (N. D. Ill. E. D.), 216 Fed. 634, 636.)

A party will not be required to answer interrogatories propounded under Equity Rule 58, where they suggest a "fishing expedition," or at least an attempt to pry into the adversary's case. The court said:

"Rule 58 was not intended to be used to impose unreasonable burdens upon parties, or to require of parties opinions either as to the reading of drawings or as to the functions of particular parts of the machinery. It provides 'for the discovery, by the opposite party or parties, of facts and documents material to the support or defense of the cause.' Plainly it is intended to aid a party in making out his case, where the ascertainment of facts in support or defense of the cause is difficult. We have used the word 'difficult,' because we have recognized that there is a line of cases holding to the doctrine that discovery will not be permitted if the facts can be otherwise procured. We do not believe that that is a correct expression of the law, because a party should not be put to unnecessary labor or difficulty in making out his case. Yet he should not impose a burden upon the opposite party in requiring the latter to make discovery, if the knowledge of

the facts can be procured otherwise with ease. Knowledge of the apparatus and method of the opposite party can be procured with ease by inspection. If there be identity of the plaintiffs' and defendant's apparatus and methods, such identity can be easily ascertained, and be the subject of parol testimony by those who have made such inspection." (Window Glass Machine Co. v. Brookville Glass & Tile Co., 229 Fed. 833, 836.)

§ 950. Interrogatories may Test Contested Infringement.

"The general purpose of Rule 58 is to expedite the decision of causes by eliminating the necessity for inquiry into the uncontroverted features of what is included in the issues as made up of record. The rule embraces all material inquiries. One of them here is the fact of infringement. The answer denies infringement. It also denies the existence of any proprietary right. The plaintiff must prove infringement. If it be not a contested fact, it can be admitted before trial. Interrogatories will test this. Any material inquiry, subject to the qualification next noted, may therefore be made, the effect of an answer to which may narrow the field of controversy at the trial. The distinction between facts and judgment from the facts, and between facts to be proven and evidentiary facts, so clearly expressed by Judge Thompson in Luten v. Camp (D. C.), 221 Fed. 424, and Blast Furnace Appliances Co. v. Worth Bros. Co. (D. C.), 221 Fed. 430, must be kept in mind." (Rodman Chemical Co. v. E. F. Houghton Co., 233 Fed. 470, 471.)

In Blast Furnace Appliances Co. v. Worth Bros. Co. (E. D. Pa.), 221 Fed. 430, the court held that in a suit to enjoin infringement of a patent by the construction of a second blast furnace from plans furnished by the inventor for the first furnace, where the defendant pleaded a setoff on account of defects in the plans for the first furnace, plaintiff may interrogate defendant as to *what payments were made for the first plans and when.*

Where defendant pleaded a license from the inventor, plaintiff might interrogate him as to the date of the construction of the furnace, in order to fix the *date of the infringement,* and also as bearing upon the question of license.

Plaintiff may also ask for the *production of the drawings* furnished for the first furnace and of the corrections made therein, from which drawings the second furnace was constructed.

In a suit against a county, a bridge contractor, and a bridge designer, to restrain an infringement of a patent for reinforced concrete construction, proof that the contract for the bridge and the blueprints contained therein infringed the patent, and that they were prepared or adopted by the defendants, is necessary to establish the right to relief, and plaintiff can therefore interrogate the defendants in relation thereto. (Luten v. Camp (E. D. Pa.), 221 Fed. 424.)

§ 951. A Witness is not Subject to Interrogatories. A mere witness not a party to a suit cannot be compelled to answer interrogatories attached to the bill. (First State Bank of Milliken v. Spencer (8th Cir.), 219 Fed. 503, 135 C. C. A. 253.)

§ 952. As to Form of Objections to Interrogatories. The rule does not provide for any particular form of objections. In P. M. Co. v. Ajax Rail Anchor Co. (N. D. Ill. E. D.), 216 Fed. 634, 635, complainant objected to all the interrogatories and moved that they be stricken out, on account of impertinence and immateriality.

Below is given a form containing various suggestive objections to interrogatories.

In the United States District Court for the Southern Division of the Southern District of California.

In Equity—No. ——.

Florence Black,
Plaintiff,
v.
James Smith,
Defendant.

OBJECTIONS TO PLAINTIFF'S INTERROGATORIES.

Comes now the defendant James Smith and makes objections to the interrogatories propounded by plaintiff as follows, to wit:

To Interrogatory No. 1, on the ground that the facts sought rest as much in the knowledge of plaintiff as of defendant; that the interrogatory is of an inquisitorial character and the facts sought are not material to the support of plaintiff's case, but said Interrogatory is intended to anticipate the defense of the statute of limitations.

To Interrogatory No. 2, on the ground that the facts sought are not ultimate facts, or material to the support of plaintiff's case, and the allegations of the plaintiff in respect to the facts if true are not difficult to be proven by other evidence.

To Interrogatory No. 3, on the ground that the disclosure is sought of facts which would merely tend to prove other facts, and is not material to plaintiff's case, or if material may be reached by demand to admit the genuineness of the instrument mentioned in the interrogatory.

To Interrogatory No. 4, as seeking disclosure of evidence not the best evidence.

To Interrogatory No. 5, as calling for opinion evidence and for facts which are the subject of expert testimony.

To Interrogatory No. 6, on the ground that said interrogatory is inquisitorial, irrelevant and premature.

To Interrogatory No. 7, as calling for a bill of particulars.

To Interrogatory No. 8, on the ground that said interrogatory is too broad, and is inquisitorial.

To Interrogatory No. 9, as being impertinent, inquisitorial and not material to plaintiff's case.

To Interrogatory No. 10, as being too broad, and further, as being inquisitorial and as seeking to ascertain evidence on which the defendant may base his defenses, and because the facts sought to be elicited are not material to plaintiff's case, are merely evidentiary and irrelevant.

Wm. Brown,
Solicitor for Defendant.

CHAPTER 44.

THE ANSWER AS A TRAVERSE.

SEC.
960. General Statement.
961. Some Differences in Answers in Federal and State Courts.
962. Answer as Such is not Evidence.
963. Time for Answer.
964. Contents of Answer.
965. Rules as to Form of Answer.
966. Amendments.
967. Attacks upon Answer.
968. Reply—When Required—When Cause at Issue.
969. Setting Down for Hearing on Bill and Answer.
970. Supplemental Answer.

§ 960. General Statement. The similarity of the provisions of the new equity rules that took effect February 1, 1913, to the code provisions of the several states that have adopted the reform procedure, is especially marked with respect to the answer in equity. Under Rule 18 technical forms of pleading are abolished. Under Rule 29, defenses formerly presentable by pleas or demurrers must be contained in the answer, though they may be separately heard. Rule 30 provides for specific denials, denials on lack of knowledge, admission of averments not denied, amendments on notice when justice requires and allows inconsistent defenses, setoffs, and counterclaims in the answer.

There has been much hesitation on the part of the profession to discard the old forms in framing answers as well as in drawing bills. In the case of Pittsburg Water Heater Co. v. Beler Water Heater Co. (W. D. Pa.), 222 Fed. 950, 952, 953, the courts commented on this matter as follows:

> "It is natural, when bills in equity are drafted without regard to the equity rules, that answers should be drawn with equal inattention to the provisions of such rules. Without going into the answer in this case at length, it is sufficient to

say that it is not in accord with Rule 30, in that it does not set forth 'in short and simple terms,' the matters of defense. As an illustration it is only necessary to refer to the fact that eight lines of the printed answer are used to reserve to defendant some supposed benefit by reason of the manifest imperfections of the plaintiff's bill. The real defenses to the bill are that Shook was not the first and original inventor and that there was no infringement."

§ 961. Some Differences in Answers in Federal and State Courts. 1. Points of law raised by demurrer or plea in state practice now may be set out in the answer under Equity Rule 29 and may be separately heard and disposed of before trial of the principal case in the discretion of the court. (See chapter 40, "Answer as a Plea.")

2. Counterclaim covers matters pleaded in state courts by cross-bill or cross-complaint.

3. No general denial.

4. No verification unless special relief pending suit sought.

§ 962. Answer as Such is not Evidence. The answer is no longer evidence, except possibly as containing admissions on the part of the defendant.

Under the old chancery practice the answer was considered as evidence because the testimony of a party was not admissible on the ground that interest made him incompetent. The reason for making the answer evidence disappeared with the change of practice authorized by § 858, Rev. Stats., providing that "in the courts of the United States no witness shall be excluded in any action . . . because he is a party to or interested in the issues tried."

The new rules conform to the present conditions, the revision omitting or changing all that existed in the old rules supporting the proposition. Thus old Equity Rule 59, providing for verification of the answer, has been superseded by new Rule 30, which

provides for the verification of "every pleading which is required to be sworn to by statute, or these rules."

Old Equity Rule 41. "Answer, when not evidence," is not contained in the new rules. So, also, there has been omitted from the revision old Rules 42, 43 and 44, relating to answering interrogatories contained in the bill. New Equity Rule 58 is the only relic of the old chancery practice requiring defendants to answer under oath.

The answer could not be evidence under the new rules, as Equity Rule 30 provides: "The answer may state as many defenses, in the alternative, *regardless of consistency*, as the defendant deems essential to his defense." In the event of pleading of inconsistent defenses, if the answer were evidence, there would be a conflict of evidence.

§ 963. Time for Answer. Unless the defendant files within twenty days after service of the subpoena some "other defense" as permitted by Equity Rules 12 and 16, or "unless the time shall be enlarged for cause shown, by a judge of the court" under Rule 16, it is the duty of the defendant to file an answer.

Under Rule 29, "If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter, or a decree *pro confesso* entered."

Equity Rule 32 provides for the answer to amended bill as follows: "In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as a case of an omission to put in an answer."

§ 964. Contents of Answer.

Part Rule 29. "Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer. . . . Every defense heretofore presentable by plea in bar or abatement shall be made in the answer, and may be separately heard and disposed of before the trial of the principal case in the discretion of the court." (3 U. S. Comp. Stats. 1916, § 1536, p. 2508; Foster's Federal Practice, 5th ed., pp. 455, 458, 485, 508, 562, 623, 630, 765, 786, 836, 1118, 1174; Simkins' Federal Equity Suit, 3d ed., pp. 32, 35, 36, 122, 124, 128, 129, 200, 204, 261, 296, 301, 310, 311, 362, 375, 386, 394, 395, 398, 399, 402, 404, 405, 407, 411, 412, 414, 416, 418, 419, 421, 426, 431, 442, 452.)

Equity Rule 30. Answer—contents—counterclaim. "The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic, or other person *non compos* and not under guardianship. The answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross suit, so as to enable the court to pronounce a final judgment in the same suit both on the original

and cross claims." (3 U. S. Comp. Stats. 1916, § 1536, p. 2509; Foster's Federal Practice, 5th ed., pp. 624, 628, 630, 681, 683, 686, 695, 697, 703, 716, 729, 1060; Simkins' Federal Equity Suit, 3d ed., pp. 283, 285, 362, 375, 394, 395, 411–413, 421–428, 429–431, 436–438, 444–449, 451–455.)

Chapter 45, *post*, deals with the "Counterclaim and Setoff" provided for in the last section of Equity Rule 30, above quoted.

In Pittsburg Water Heater Co. v. Beler Water Heater Co. (W. D. Pa.), 222 Fed. 950, the court said:

> "It seems, therefore, a proper inference from the provisions of the equity rules with respect to oaths to portions of the record other than the answer, and the omission of the requirement of an oath to an answer, that an answer in equity need not now be made under oath."

§ 965. Rules as to Form of Answer. Equity Rule 18 provides: "Unless otherwise prescribed by statute or these rules, the technical forms of pleading in equity are abolished." Under Equity Rule 24, the answer is required to be "signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instruction laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay."

There is no provision as to verification.

If the answer contains a counterclaim or setoff which seeks special relief pending the suit, the counterclaim or setoff should be verified by analogy to the fifth subdivision of Rule 25, providing: "If special relief pending the suit be desired, the bill should be verified by the oath of the plaintiff or someone having knowledge of the facts upon which such relief is asked." In case the pleading is verified, Equity Rule 36 provides for the officers before whom the same may be done, as follows: "Every pleading which is required to be sworn to by statute, or these rules, may be verified before any justice or judge of any court of the United

States, or of any state or territory, or of the District of Columbia, or any clerk of any court of the United States, or of any territory, of the District of Columbia, or any notary public." Equity Rule 78 provides for an affirmation in lieu of an oath where the party has conscientious scruples against taking an oath.

§ 966. Amendments. By Equity Rule 30, above quoted (§ 964), it is provided that "the answer may be amended by leave of the court or judge upon reasonable notice, so as to put any averment in issue when justice requires it."

By Equity Rule 33, an answer setting up an affirmative defense, setoff, or counterclaim, "if found insufficient but amendable, the court may allow an amendment upon terms or strike out the matter."

§ 967. Attacks upon Answer. Further and particular statement may be required.

> *Equity Rule 20.* "A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just." (Chapter 41, *supra*.)

Redundant, impertinent, or scandalous matter may be stricken out.

> *Equity Rule 21.* "The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit." (Chapter 42, *supra*.)

The sufficiency of the defense may be tested by a motion to strike out.

> *Equity Rule 33.* "Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off, or counterclaim, the plaintiff may, upon five

days' notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amendable the court may allow an amendment upon terms, or strike out the matter." (3 U. S. Comp. Stats. 1916, § 1536, p. 2511; Foster's Federal Practice, 5th ed., pp. 786, 787; Simkins' Federal Equity Suit, 3d ed., pp. 432, 435.)

Chapter 46, *post*, deals with this "Motion to Strike Out."

§ 968. Reply—When Required—When Cause at Issue.

Equity Rule 31. "Unless the answer assert a set-off or counterclaim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counterclaim, the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counterclaim is one which affects the rights of other defendants, they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counterclaim may be entered as in default of an answer to the bill." (3 U. S. Comp. Stats. 1916, § 1536, p. 2511.)

§ 969. Setting Down for Hearing on Bill and Answer.

"Where complainant sets a cause down for hearing on bill and answer, all allegations of the answer well pleaded are admitted, and only questions of law are presented for determination." (City of Wichita v. Wichita Water Co. (8th Cir.), 222 Fed. 789, 138 C. C. A. 337.)

§ 970. Supplemental Answer. Equity Rule 34, as to supplemental pleading, applies as well to answers as to bills. See chapter 32 above.

CHAPTER 45.

COUNTERCLAIM AND SETOFF.

SEC.
980. Counterclaim and Setoff Under Second Paragraph Equity Rule 30.
981. Illustration of Counterclaim Growing Out of Same Transaction—Unfair Competition.
982. Setoff or Counterclaim Subject of an Independent Equity Suit Against Plaintiff.
983. Cross-bill Abolished.
984. Counterclaim may not be Used to Bring in New Parties nor for Intervention.
985. Unliquidated Damages Unless Arising Out of the Transactions Involved are not Matters of Counterclaim.
986. Effect of Failure to Plead Counterclaim or Setoff.

§ 980. Counterclaim and Setoff Under Second Paragraph Equity Rule 30.

2d Par. Equity Rule 30. "The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit, and may, without cross bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and cross-claims." (3 U. S. Comp. Stats. 1916, § 1536, p. 2509; Foster's Federal Practice, 5th ed., pp. 624, 628, 630, 681, 683, 686, 695, 697, 703, 716, 729, 1060; Simkins' Federal Equity Suit, 3d ed., pp. 283, 285, 362, 375, 394, 395, 411, 412, 413, 421, 422, 423, 424, 425, 426, 428, 429, 431, 432, 433, 434, 436, 437, 438, 444, 445, 446, 447, 448, 449, 451, 452, 453, 454, 455.)

This short paragraph is the only federal authority that recognizes counterclaims and setoffs, for prior to the adoption of the new equity rules the only relief that could be sought in an answer was the dismissal of the bill. Affirmative matter could not be set

up in the answer, but was required to be pleaded by cross-bill. The federal decisions relating to federal procedure, therefore, do not define counterclaims and setoffs, the federal statutes do not provide for them, nor do the new rules except that above quoted, and Rule 31 providing for replies to counterclaims or setoffs, and Rule 33 for testing the sufficiency of same by a motion to strike out.

The rule designates two kinds of counterclaims: (1) Those "arising out of the transaction which is the subject matter of the suit"; (2) those "which might be the subject of an independent suit in equity against" plaintiff.

The second kind of a counterclaim is broad enough to include matters "connected with the subject of the action" though not necessarily "arising out of the transaction which is the subject matter of the suit." It is broader than and includes that kind of cross-claim which is known as a "setoff," which term seems to be merely an alternative expression for "counterclaim."

There is a large group of states which make a distinction between setoff and counterclaim, the setoff being used to set out independent or external matters as the subject of a cross-claim, while in another group of states, the term "setoff" is not used, but there are two kinds of counterclaims, the second kind of which correspond to the "setoff" above mentioned. (Pomeroy's Code Remedies, 4th ed., p. 835.)

That the term "setoff" is merely an alternative term for "counterclaim" is borne out by the fact that the rules always use these terms in the alternative with the disjunctive "or." In Rule 30, "set out any setoff or counterclaim," and again, "and such setoff or counterclaim." In Rule 31, "unless the answer asserting setoff or counterclaim," and again, "if the answer include a setoff or counterclaim," and the rule also provides for a decree *pro confesso* on the counterclaim, but does not mention such a decree in connection with setoff.

§ 981. Illustration of Counterclaim Growing Out of Same Transaction—Unfair Competition.

"Plaintiff having brought a suit in this district thereby subjected itself to any counterclaim or set-off which is fairly within the Equity Rule above quoted. The counterclaims pleaded in the answer grow out of the very same transactions and matters covered by the original bill. The three patents referred to in the answer upon expansion bolts are all along the same line, and the question of unfair competition is intimately connected with the rights of the respective parties under these patents. These matters ought to be all disposed of in one suit, as they relate to questions very closely connected together. It is probable that a decision may be reached in this district long before it could be had in the Southern district of New York or in the Supreme Court of the state of New York, where the unfair competition suit is pending. It seems to me that the ends of justice will be promoted by allowing these interrogatories and counterclaims to stand, and have the whole matter in the suit between these parties decided at any early date." (United States Expansion Bolt Co. v. H. G. Kroncke Hardware Co. (W. D. Wis.), 216 Fed. 186, 189.)

Dismissal of Plaintiff's Bill on the Merits Does not Affect Defendant's Counterclaim for Unfair Competition. In Buffalo Specialty Co. v. Vancleef (N. D. Ill.), 217 Fed. 91, which is quoted more fully in § 982 below, the court allowed a counterclaim for unfair competition as being the subject of an independent suit in equity against plaintiff and held that dismissal of the bill on the merits did not affect the counterclaim.

Matters of unfair competition which do not grow out of the transaction which is the subject matter of the suit cannot be set up as a counterclaim in a suit between citizens of the same state, because by itself it would have no federal ground of jurisdiction to support it.

In Electric Boat Co. v. Lake Torpedo Boat Co. (D. N. J.), 215 Fed. 377, the court held that the word "transaction," as so used, embraced both the right and the breach of it, together with the

various occurrences that make up each; and hence, in a suit between citizens of the same state, where complainant sued for infringement of certain patents, defendant was not entitled to set up as a counterclaim damages for unfair competition and alleged malicious prosecution, consisting of matters occurring before the facts on which complainant relied occurred and independent thereof.

§ 982. Setoff or Counterclaim Subject of an Independent Equity Suit Against Plaintiff. Equity Rule 30 provides that the answer "may, without cross-bill, set out any setoff or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him." Does this setoff or counterclaim include other matters than that which formerly could have been set up by cross-bill?

The cross-bill under the former practice has been confined to matters germane to the purposes of the bill. It was required to be connected with it in some way. The use of the term "setoff" indicates separate unconnected extrinsic cause of action, and would seem to be much broader.

Since the foregoing portion of the text was written for the first edition of this manual many decisions have been published adopting the liberal view of the rule. On the other hand, a large number of opinions adopt a strict construction and confine the counterclaim or setoff to matters germane to the bill.

In Electric Boat Co. v. Lake Torpedo Boat Co. (D. N. J.), 215 Fed. 377, the court held that the word "cross-bill" was used as synonymous with "cross-suit" and cross-claim, so that the limitation on what counterclaims may be set up is not that it must have arisen out of the transaction which is the basis of the original bill, but that the subject matter is such as might be the subject of an independent suit in equity against the complainant, and hence, in a suit for infringement of a patent, defendant may set up in its answer a counterclaim for infringement by complainant of a dif-

ferent patent unrelated to the transaction and made the basis of complainant's bill.

In Harper Bros. v. Klaw (S. D. N. Y.), 232 Fed. 609, 611, Judge Hough said:

> "Prior to the present rules in equity defendants would have been obliged to file a cross-bill, if they had sought to obtain the relief here demanded. Whether such a cross-bill as this could be sustained under Lautz v. Gordon (C. C.), 28 Fed. 264, and Hogg v. Hoag (C. C.), 107 Fed. 807, and 154 Fed. 1003, 83 C. C. A. 677, is a point on which much learning (probably useless) might be expended. It is my opinion that Rule 30 in equity has deliberately and wisely enlarged the function of a cross-bill, now called a counterclaim. . . .
>
> "It is in my opinion now proper to do what these defendants have done; i. e., deny the equity of plaintiffs' bill, ground such denial on the language of a written document, and serve a counterclaim to prevent plaintiffs from violating said contract as understood by defendants. It is proper to do this, even though it cannot be said that the matter of the counterclaim, cross-suit, or cross-bill is merely auxiliary to the original suit. It is enough that in the language of the present rule the counterclaim shows something 'which might be the subject of an independent suit in equity against' the plaintiffs." (Harper Bros. v. Klaw (S. D. N. Y.), 232 Fed. 609, 611.)

In Buffalo Specialty Co. v. Vancleef et al. (N. D. Ill.), 217 Fed. 91, at page 93, the court said:

> "It will be seen that rule 30 requires defendant to set up any counterclaim which arises out of the transaction forming the subject matter of the bill, but allows without requiring him to set up any equitable counterclaim or set-off which might be the subject of an independent suit by defendant against plaintiff. The language is perfectly clear: If defendant has an independent cause of action in equity against plaintiff, he may counterclaim it. If any corroboration of this view were needed, it is found in the fact that the Supreme Court, in adopting the rule, omitted the last clause of the English rule which restricts counterclaims to those which can be conveniently disposed of and those which ought to be al-

lowed. Not only was any set-off or counterclaim which may be the subject of an independent suit included, but an exception was rejected. Moreover, it has always been held by the English courts that independent causes of action, wholly unconnected with the claim of the plaintiff, may be counterclaimed. Birmingham Estates Co. v. Smith, 13 Ch. D. 506, 509. Nor is a counterclaim to be excluded because plaintiff is a foreigner who could not be sued in England. By invoking the jurisdiction, he consents to be sued there by counteraction, unless plaintiff be a sovereign, not suable without its consent. Griendtovan v. Hamlyn & Co., 8 L. T. R. 231; Strousberg v. Costa Rica Republic, 29 W. R. 125, Ch. App.; Imperial Japanese Govt. v. Peninsular & Oriental etc. Nav. Co. (1895), A. C. 644, P. C. Nor is the amount recoverable by counterclaim limited by the jurisdiction of the court (Amon v. Babbett, 22 Q. B. D. 543, Ch. App.), unless objection is made by giving written notice, as required by the Judiciary Act of 1873. By adopting the English rule, its construction in England is adopted, at least to the extent of excluding construction at variance with plain and explicit language. Under such circumstances, the clear meaning of the words should not be rejected on account of supposed inconvenience in applying the rule.

"It is said in argument that it could not have been the intention of the rule to compel a nonresident plaintiff to submit to cross-suits in districts foreign to his residence, and thus run counter to express statutes, like section 51 of the Judicial Code, or the Act of March 3, 1897, c. 395, relating to place of suit. Section 51 provides that civil suits, other than those of diverse citizenship, shall only be brought in the district where defendant inhabits, the others only in the district of the residence of either party. The act of 1897 applies only to patent cases, and provides that the court shall have jurisdiction only in the district where defendant inhabits, or where he has committed infringement and has an established place of business. But these acts do not relate to the general jurisdiction of the district court, only to the power of the particular court to proceed. They give defendant a privilege which he may waive. If the counterclaim defendant (original plaintiff) raises the question of jurisdiction at the outset, and succeeds, defendant may have a speedy decision of this ques-

tion by the Supreme Court. Whatever the decision may be affects the scope of rule 30, not its construction.

"It is true that the weight of authority in the construction of the new rule limits its scope to counterclaims which might formerly have been made the subject of a cross-bill. Terry Steam Turbine Co. v. B. F. Sturtevant Co. (D. C.), 204 Fed. 103; Williams Patent Crusher etc. Co. v. Kinsey Mfg. Co. (D. C.), 205 Fed. 375; Adamson v. Shaler (D. C.), 208 Fed. 566; Klauder-Weldon Dyeing Mach. Co. v. Giles (D. C.), 212 Fed. 452; Sydney v. Mugford Printing etc. Co. (D. C.), 214 Fed. 841. To the contrary are Marconi Wireless Tel. Co. v. National Elec. Signaling Co. (D. C.), 206 Fed. 295; Salt's Textile Mfg. Co. v. Tingue Mfg. Co. (D. C.), 208 Fed. 156; Vacuum Cleaner Co. v. American Rotary Valve Co. (D. C.), 208 Fed. 419; and Electric Boat Co. v. Lake Torpedo Boat Co., 215 Fed. 377. The cases supporting a limited application of the rule proceed upon the theory that it was not intended to change the substantive law providing what could be treated as a set-off or counterclaim prior to the rule (Judge Thomas, 214 Fed. 841), and that the words 'shall have the same effect as a cross-suit' mean to limit the counterclaim to what might have been brought in by cross-bill. These words are adopted from the English rule, except that 'cross-suit' is there 'cross-action.' Why not give them the settled construction of the English courts? As Judge Chatfield says in the Marconia case: 'Here we have a deliberate use of new terms covering any "independent suit in equity" to have the result of a "cross-suit," and yet to be pleaded "without cross-bill."'

"The contrary view is strongly argued by Judge Dodge in the Terry Case, Judge Geiger in the Adamson Case, and Judge Thomas in the Sydney Case. But the new equity rules were conceived in a most liberal spirit, and I think the one in question should be given its manifest meaning, so as to allow all mutual claims in equity to be set off or opposed, as is done under the English practice. I have examined many English decisions under order 19, and am convinced that the rule has there worked justly. It has been given a broad and liberal construction but has not been extended (as its terms prohibit) to cases so incongruous as to be incapable of trial with the original suit. Bartholomew v. Rawlings, W. N. 56; Huggons v. Tweed, 10 Ch. D. 359; Compton v. Preston, 21

Ch. D. 138. Such an exception may also properly be applied under rule 30, since the rule relates only to equitable causes of action. If it would be inequitable to subject the plaintiff to the defense of an incongruous cross-action, surely the court would decline jurisdiction. I am convinced, therefore, that the dismissal of the bill had no effect on the counterclaim for unfair competition. The Electric Boat Company Case contains an able discussion of the construction of the words of the rule."

§ 983. Cross-bill Abolished. The only reference in the index of the equity rules to the cross-bill reads as follows: "Cross-bill counterclaim to be stated in answer, and not by." The only reference in the rules to the cross-bill is in Equity Rule 30, providing that the defendant "may, *without cross-bill,* set out any setoff or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him." The federal statutes and the new equity rules do not provide for the procedure in the event of the filing of a cross-bill, and the evident intent is that a counterclaim or setoff should be used, instead of cross-bill.

Since the above was first written the court held in the case of In re Grand Union Co. (2d Cir.), 219 Fed. 353; 135 C. C. A. 237, that Rule 30 obviates the necessity of filing a cross-bill, and affirmative relief may now be asked in the answer.

The new counterclaim and setoff seem to cover all or almost all which could have been pleaded by the cross-bill under the former practice. The purposes of the cross-bill were as follows:

1. *Affirmative relief.* As the only prayer of the answer under the old practice was for dismissal of the bill, the cross-bill was the only method of obtaining affirmative relief. The new rule provides that the "setoff or counterclaim so set up *shall have the same effect as a cross-suit,* so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims." There can be no doubt but that under Rule 30, the reformation of an instrument sued upon may be sought by the defendant on the ground of mistake or fraud, or that the defend-

ant could set up usury, or pray that an agreement be surrendered which is sought to be specifically enforced. In fact, these are matters arising out of the transaction which is the subject matter of the suit, and *must* be set out in the answer, and not by cross-bill.

2. *Discovery.* The cross-bill is no longer necessary for discovery in aid of an answer, as Equity Rule 58 now provides for the filing of interrogatories in writing for the discovery, by the opposite party or parties, of facts and documents material to the support or the defense of the cause.

This was also true under the old rules, but the old rules by old Equity Rule 72 recognized the right of defendant to obtain discovery by cross-bill by requiring an answer to the original bill before the plaintiff was compelled to answer the cross-bill. Old Equity Rule 72 is now abolished, and there is no recognition of the cross-bill in the new rules except the permission to set up matters *without* a cross-bill.

3. *To set up new matter arising after issue joined.* Under the old practice it was not possible to set up new matter by a supplemental answer. Old Rule 46 as to supplement pleading referred to the bill only. Therefore it was necessary to set up this new matter by cross-bill.

This is no longer necessary, because the new Equity Rule 34 provides for a supplemental answer as well as a supplemental bill.

> *Equity Rule 34.* "Upon application of either party the court or judge may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof." (3 U. S. Comp. Stats. 1916, § 1536, p. 2512; Simkins' Federal Equity Suit, 3d ed., pp. 366, 368, 370, 371, 376, 438, 439.)

4. *Means of defense.* The cross-bill is no longer necessary to set up matters which could not be pleaded in the answer, because

the answer is now of such a broad character that defensive matters which were formerly barred may now be included under the provision of Equity Rule 30, which reads: "The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense." Hence, a discharge in bankruptcy; an agreement or conveyance, or matters purely legal, could be set up in an original or a supplemental answer.

5. *To settle conflicting claims between the defendants.* The new rule provides for two distinct kinds of counterclaims: (1) "Any counterclaim arising out of the transaction which is the subject matter of the suit"; (2) "any setoff or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him."

The second kind of counterclaim would not cover conflicting claims among the defendants themselves, as the rule specifically states that the setoff or counterclaim is "against the plaintiff." Equity Rule 31 provides: "If the answer includes a set-off or counterclaim, the party against whom it is asserted shall reply within ten (10) days after the filing of the answer, unless a longer time be allowed by the court or judge." The party mentioned is evidently the plaintiff, as other defendants ought to be given notice of a counterclaim affecting them before being required to reply to same.

The first kind of counterclaim mentioned, one, "arising out of the transaction which is the subject matter of the suit," evidently may affect the rights of others than the plaintiff, for Equity Rule 31 provides with respect to this class of counterclaim, "if the counterclaim is one which affects the rights of other defendants, they or their solicitors shall be served with a copy of the same within ten (10) days from the filing thereof, and ten (10) days, shall be accorded to such defendant for filing a reply."

It would therefore seem that conflicting claims between the defendants arising out of the transaction which is the subject matter of the suit could be litigated by counterclaim.

6. *For a complete determination of all matters affected by the bill.* That this is the intent of the rule as is indicated by the language that "such set-off or counterclaim, so set up, *shall have the same effect as a cross suit*, so as to enable the court to pronounce a final judgment in the same suit *both* on the original and cross claims."

§ 984. Counterclaim may not be Used to Bring in New Parties nor for Intervention. An injunction was sought against owner of patent to restrain him from terrorizing the trade through a succession of threats, etc. Parties interested in the patent sought to intervene to file counterclaims for infringement of the patent being the infringement asserted by defendant in its conduct, which is the subject matter of the suit.

The court held new Equity Rules 30 and 37 do not permit one who is not a necessary or proper party to the determination of the issues in the case to intervene by counterclaim. (Atlas Underwear Co. v. Cooper Underwear Co., 210 Fed. 347, 355.)

In United States v. Woods (8th Cir.), 223 Fed. 316, 138 C. C. A. 578, the court held that Equity Rule 30, providing that the answer may, without cross-bill, set out any setoff or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, does not authorize the filing of a cross-bill in a suit by the government on behalf of the Creek Indians to cancel conveyances of allotted lands, which bill prayed that individuals claiming an interest in the lands adverse to defendant be joined as parties and required to litigate their claims.

> (Page 317.) "The general rule is that new parties cannot be introduced into a cause by a cross-bill; that only parties to the original bill, plaintiffs or defendants, can be made parties to a cross-bill. If the plaintiff desires to make new parties, he amends his bill and in that way introduces them. If the defendant requires the presence of parties other than those named in the original bill, he complains of a nonjoinder by answer, and plaintiff is then forced to amend or the bill may be dismissed. Such is the general rule in equity."

§ 985. Unliquidated Damages Unless Arising Out of the Transaction Involved are not Matters of Counterclaim. In Williams v. Adler Goldman Commission Co. (8th Cir.), 227 Fed. 374, 142 C. C. A. 70, it was sought to interpose counterclaims for unliquidated damages in a suit by creditors to set aside a conveyance as fraudulent. The court said:

> (Page 378.) "The great per cent in number and amount of items set up in the counterclaim are for unliquidated damages and could not 'be the subject of an independent suit in equity,' and none of the items arise 'out of the transaction which is the subject matter of the suit.' Equity Rule 30."

§ 986. Effect of Failure to Plead Counterclaim or Setoff. The rule provides that "the answer *must state* . . . any counterclaim arising out of the transaction which is the subject matter of the suit." This would seem to preclude setting up such matter thereafter, as under the rule stated in this form, the issues would necessarily be involved and therefore *res adjudicata.*

The text is now supported by Portland Wood Pipe Co. v. Slick Bros. Const. Co. (D. Idaho), 222 Fed. 528.

In that case the court held that in a suit by a nonresident of the district to foreclose a mechanic's lien, in which the contractor and a subcontractor, resident citizens of the district, are made defendants, and the subcontractor by a cross-bill asserts a lien upon the property, the court has jurisdiction over a counterclaim by the contractor against the subcontractor for moneys advanced and supplies furnished the subcontractor on account during the progress of, and for use in carrying on, the work, though the amount of the counterclaim exceeds the amount due the subcontractor, and has jurisdiction to render judgment against the subcontractor for the balance, under the rule that, where the court has jurisdiction of the controversy exhibited by the complaint, it may assume jurisdiction to adjudicate incidental issues raised by cross-bills between defendants, regardless of citizenship or the amount in dispute, especially in view of Equity Rule 30, providing that the answer must state in short and simple form any counterclaim

arising out of the transaction which is the subject matter of the suit, and Rev. Codes Idaho, section 4185, providing, relative to counterclaims arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, that if defendant omit to set up such a counterclaim, he cannot afterward maintain an action against the plaintiff therefor.

The rule provides also that the "answer *may*, without cross-bill, set out any setoffs or counterclaims against the plaintiff which might be the subject of an independent suit in equity against him." The use of the verb in the permissive form would indicate that as to such matters the defendant would not afterward be barred from proceeding by an independent suit in equity on his claim. It has been generally held that, in the absence of express statutory provisions to the contrary, the failure to plead these matters does not bar them, and no such effect is given by the statutes authorizing the counterclaim. In code states the defendant may elect to set up his cross-demand as a counterclaim, or may not do so, but may set up and maintain a separate action upon it. (Pomeroy's Code Remedies, p. 938, cases cited.)

CHAPTER 46.

MOTION TO STRIKE OUT.

SEC.

1000. Equity Rule 33—Motion to Strike Out—Five Day Notice.
1001. Illustrative Case of Motion to Strike Out Defense as Insufficient.
1002. Form of Motion to Strike Out.

§ 1000. Equity Rule 33—Motion to Strike Out—Five Day Notice.

Equity Rule 33. "(*Testing sufficiency of defense.*) Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, setoff or counterclaim, the plaintiff may, upon five days' notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amendable the court may allow an amendment upon terms, or strike out the matter." (3 U. S. Comp. Stats. 1916, § 1536, p. 2511; Marconi Wireless Tel. Co. v. National Electric Signaling Co., 206 Fed. 295, 301; Sydney v. Mugford Printing etc. Co., 214 Fed. 841; Shera v. Merchants' Life Ins. Co., 237 Fed. 484, 485.)

This is a new rule superseding old rules 61, 63, 64.

§ 1001. Illustrative Case of Motion to Strike Out Defense as Insufficient. The bill was brought to foreclose builder's or mechanic's statutory lien. The owner's amended answer set up claim of noncompliance with Florida statute as to foreign corporation filing its articles of incorporation. After the evidence closed the owner filed amendment to show noncompliance until the date of the contract and commencement of the work. Plaintiff submitted motion to strike out. Motion denied and bill dismissed. On appeal the case was reversed, the court stating:

"Before the allowance of the last-mentioned amendment, the only allegation of the owner's answer as to a noncompliance by the plaintiff with the Florida foreign corporation

statute was one which was not supported by the evidence adduced. Without further pleading by the plaintiff, that allegation was to be deemed to be denied by it. Equity Rule 31 (198 Fed. xxvii, 115 C. C. A. xxvii). . . . The averments of the last-mentioned amendment to the answer failed to show that the plaintiff was under a disability to acquire contractual rights throughout the period in which the averments of the bill and the evidence supporting them showed that such rights were accruing to it. In other words, the averments of that amendment did not show the existence of a state of facts constituting a defense to the bill as a whole. The sufficiency of the defense set up by that pleading was properly tested by a motion to strike out. Equity Rule 33." (Turner Construction Co. v. Union Terminal Co. (5th Cir.), 229 Fed. 702, 704, 705, 144 C. C. A. 112.)

§ 1002. Form of Motion to Strike Out.

[Title of Court.]

MOTION TO STRIKE OUT COUNTERCLAIM AS INSUFFICIENT.

[Title of Case.]

Plaintiff moves to strike out defendant's counterclaim on the ground that same does not state facts sufficient to constitute a counterclaim against this plaintiff under Equity Rule 30.

John Brown,
Solicitor for Plaintiff.

CHAPTER 47.

REPLY.

SEC.

1010. Equity Rule 31—Reply to Setoff or Counterclaim—Issue.
1011. The Scope of the Reply.

§ 1010. Equity Rule 31—Reply to Setoff or Counterclaim—Issue.

Equity Rule 31. "(*Reply—When required—When cause at issue.*) Unless the answer assert a set-off or counterclaim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counterclaim the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counterclaim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of same within 10 days from the filing thereof, and ten days shall be accorded such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counterclaim may be entered as in default of an answer to the bill." (3 U. S. Comp. Stats. 1916, § 1536, p. 2511; Foster's Federal Practice, 5th ed., pp. 615, 624, 695, 698; Simkins' Federal Equity Suit, 3d ed., pp. 355, 386, 415, 428, 440, 445, 451, 491.)

§ 1011. The Scope of the Reply. Rule 31, quoted § 1010 above, does not require a reply without special order of the court or judge, unless the answer assert a setoff or counterclaim.

Necessarily the "reply" contemplated by this rule transcends the scope of the "replication" used when the defendant's pleading was limited to the controversy forming the basis of the plaintiff's complaint, and includes that which would be an answer and counterclaim under Rule 30. (Electric Boat Co. v. Lake Torpedo Boat Co., 215 Fed. 377.)

Matter of confession and avoidance does not require a reply. (Shera v. Merchants' Life Ins. Co., 237 Fed. 484, 486.)

CHAPTER 48.

DEPOSITIONS.

SEC.

1020. Depositions—Rules 47, 54 and 55.
1021. Not "Good and Exceptional Cause" to Avoid Several Days in Trial.
1022. Time for Taking Depositions—Rule 47 Governs Unless Conflicting With § 863, Rev. Stats., et seq.
1023. Extending Time.

§ 1020. Depositions—Rules 47, 54 and 55.

Equity Rule 47. "(*Depositions—To be taken in exceptional instances.*) The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires."

Equity Rule 54. "(*Deposition under Rev. Stats., §§ 863, 865, 866, 867—Cross-examination.*) After a cause is at issue, depositions may be taken as provided by §§ 863, 865, 866 and 867, Revised Statutes. But if in any case no notice has been given the opposite party of the time and place of taking the deposition, he shall, upon application and notice, be entitled to have the witness examined *orally before the court,* or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge under all the circumstances shall order."

Equity Rule 55. "*(Deposition deemed published when filed.)* Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published, unless otherwise ordered by the court."

§ 1021. Not "Good and Exceptional Cause" to Avoid Several Days in Trial. "*Good and exceptional cause* for departing from the general rule" requiring the testimony of witnesses to be taken orally in open court is not shown merely by the fact that a trial will probably occupy several days. (North v. Herrick, 203 Fed. 591.)

§ 1022. Time for Taking Depositions—Rule 47 Governs Unless Conflicting With § 863, Rev. Stats., et seq. Although it is held that Rule 47 was not intended to vary or limit § 863, Rev. Stats. (Iowa Washing Machine Co. v. Montgomery Ward & Co. (S. D. N. Y.), 227 Fed. 1007), and the ruling in Victor Talking Machine Co. v. Sonora Phonograph Corp., quoted below, is not followed in Iowa Washing Machine Co. v. Montgomery Ward & Co. cited just above and by other courts, it is well to note the reasoning and opinion in Victor Talking Mach. Co. v. Sonora Phonograph Corp. (S. D. N. Y.), 221 Fed. 676, 677, 678, as follows:

"These rules, with others, were designed to expedite the progress of suits in equity. After the lapse of time under the rules, the cause is automatically placed on the calendar, and any departure from the automatic action of the rules in various respects may be had only when 'otherwise ordered by the court or judge for good cause shown.' If, therefore, after the time expiration, it becomes necessary to take depositions, there is no difficulty in making a proper presentation to the court or judge and obtaining an appropriate order.

"It is urged, however, that Rule 47 cannot limit the time of taking depositions, in view of section 863 of the United States Rev. Stats., and that, where the witness is one within the purview of that section, a deposition may be taken after the time prescribed in Rule 47. But Rule 47 refers, among other things, to 'all depositions taken under a statute,' and, as it must be assumed that the Supreme Court was construing

(among others) section 863, the validity of the rule is, of course, conclusive upon this court. I see nothing in Rule 54 inconsistent with Rule 47; nor do I read Henning v. Boyle (C. C.), 112 Fed. 397, and In re National Equipment Co., 195 Fed. 488, 115 C. C. A. 398 (decided prior to February 1, 1913), as contrary to the conclusion now stated.

"In the suits at bar, plaintiff gave notice of the taking of depositions on December 20, 1913, some six months after issue was joined. Neither Rule 47 nor Rule 1 of this court was complied with. Defendant promptly and clearly notified plaintiff that it objected to this taking of testimony by deposition, that its counsel would not attend, and that it would move, at the trial, to strike out the testimony thus taken and for further germane relief. Nevertheless plaintiff proceeded and, in doing so, it took chances. There was nothing further which defendant was called upon to do. It might have waited until the trial, but, instead, has moved now, and, even if laches were an answer (which I doubt), there is none in this case.

"If I have construed the rule correctly, I may add that, on the facts in this case, I doubt the power to make an order *nunc pro tunc*. If the matter is one of discretion, I think it would be an abuse of discretion to allow, over objection, an order *nunc pro tunc* which would abrogate the rule, upon the observance of which defendant had the right to rely.

The motion to suppress the fact depositions is granted."

§ 1023. **Extending Time.** If, after the time expiration, it becomes necessary to take depositions, there is no difficulty, on making a proper presentation to the court or judge, in obtaining an appropriate order. (Victor Talking Mach. Co. v. Sonora Phonograph Corp., 221 Fed. 676.)

CHAPTER 49.

SETTING FOR TRIAL—CALENDAR.

SEC.

1030. Rule 56 as to Case Going on Trial Calendar and Restricting Taking Depositions Thereafter.
1031. Sufficiency of Showing of Compliance With the Rule Restricting Depositions After Case has Gone on Trial Calendar.
1032. Equity Rule 57 Restricting Allowance of Continuances After Case on Trial Calendar.
1033. Case is not Dropped from the Calendar After Hearing but Court may Render Decree After Term.

§ 1030. Rule 56 as to Case Going on Trial Calendar and Restricting Taking Depositions Thereafter.

Equity Rule 56. "*(On expiration of time for depositions, case goes on trial calendar.)* After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further testimony by deposition shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give."

§ 1031. Sufficiency of Showing of Compliance With the Rule Restricting Depositions After Case has Gone on Trial Calendar.

In United Lace & Braid Mfg. Co. v. Barthels Mfg. Co. (E. D. N. Y.), 217 Fed. 175, 176, the court said:

"While these papers do not set forth in detail entirely satisfactory reasons, showing inability to produce upon the trial the witnesses named, or others who would testify in the same way upon the same matters, nor just what evidence each witness will give with respect to the issues in the case, and while therefore the rule is not yet fully met, in the way that the usual application to examine a particular witness would

be required to be presented, nevertheless it would appear that the motion should be granted to the extent of allowing the plaintiff to obtain the depositions, in the form of direct examination, and to give opportunity at the same hearing for cross-examination of any of the witnesses named, in Providence and Boston, whose actual presence at the trial shall not be of any benefit at the hearing of the case. In such a matter as the present, there would seem to be no necessity for requiring strict compliance with the rule, nor in preventing the preparation of depositions for submission upon the trial, when all questions and objections as to the materiality and relevancy of the testimony, and as to the competency of using a deposition instead of requiring the actual presence of the witnesses to give oral testimony, can be raised. All such rights will be preserved to the defendant, who may attend the taking of the depositions without prejudice thereto."

§ 1032. Equity Rule 57 Restricting Allowance of Continuances After Case on Trial Calendar.

Equity Rule 57. "(*Continuances.*) After a cause shall be placed on the trial calendar it may be passed over to another day of the same term, by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion impose. Continuances beyond the term by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one."

§ 1033. Case is not Dropped from the Calendar After Hearing but Court may Render Decree After Term. In Davis v. Virginia Ry. & Power Co. (4th Cir.), 229 Fed. 633, 638, 144 C. C. A. 43, the court said:

" . . . It is argued that the case was finally disposed of by being automatically dropped from the calendar on October 4, 1913, the last day of the April term, under the requirement of Equity Rule 57, and that the failure to appeal within six months from that date was fatal. The point is not well taken. The rule forbidding continuances was meant to prevent delay in the hearing of causes, and perhaps it was intended also as a stimulating admonition to judges to decide cases as promptly as possible; but it does not mean that after a case has been heard it shall be dropped from the calendar at the end of the term and thus disposed of before the court has made a final decree."

CHAPTER 50.

TRIAL—EQUITY SUITS.

SEC.

1040. In General.
1041. Depositions After Issue and Affidavits of Expert Witnesses in Patent and Trademark Cases.
1042. Mode of Proof Under § 862, Rev. Stats.
1043. Rulings on Admissibility of Evidence Under Equity Rule 46.
1044. Appointment of a Stenographer Under Equity Rule 50.
1045. Affidavits of Expert Witnesses—Patent and Trademark Cases Under Equity Rule 48.
1046. Pleading and Proof in Actions for Infringement Under § 4920, Rev. Stats.

§ 1040. In General. Under Equity Rule 46 (§ 1043, *post*), the trial of an equity suit, like that of an action at law, is by producing the witnesses in open court, unless under Equity Rule 47 (§ 1020, *supra*), depositions have been taken for good and exceptional cause for departing from the general rule, or, under Equity Rule 54 (§ 1020, *supra*), after the cause was at issue, depositions were taken under §§ 863, 865 and 867, Rev. Stats.

Discovery by means of written interrogatories and demanding the admission of the genuineness of documents, etc., under Equity Rule 58 is treated in chapter 43 above.

§ 1041. Depositions After Issue and Affidavits of Expert Witnesses in Patent and Trademark Cases. Under Equity Rule 47 (chapter 48, *supra*), depositions may be taken when allowed by statute or for good and exceptional cause for departing from the general rule. Those of the plaintiff within sixty days from the time the cause is at issue; of the defendant within thirty days from the expiration for filing plaintiff's depositions; rebutting depositions by either party within twenty days after the time for taking original depositions expires.

Under Equity Rule 54, if the cause is at issue, depositions may be taken as provided by §§ 863, 865, 866, and 867, Revised Statutes.

In cases involving the validity or scope of a patent or trademark, the testimony in chief of expert witnesses as to matters of opinion may be set forth in affidavits, under Equity Rule 48, those of plaintiff within forty days after the causes at issue, defendant within twenty days after plaintiff's time has expired, and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits.

§ 1042. Mode of Proof Under § 862, Rev. Stats.

§ *862, Rev. Stats.* "The mode of proof in causes of equity . . . shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided." (3 Fed. Stats. Ann., 2d ed., p. 171; 3 U. S. Comp. Stats. 1916, § 1470.)

In chapter 11, on "Evidence," will be found quoted the statutory provisions permitting the admission of copies of documents, for restoring laws, judgments, and records and admission of same in evidence, and with respect to acts of the state legislatures, records, and judicial proceedings of state courts, their authentication and proof and other matters of like character.

Provisions as to subpoenas and other matters relating to witnesses are set out in chapter 12 above. Depositions are treated in chapters 13 and 48 above.

§ 1043. Rulings on Admissibility of Evidence Under Equity Rule 46.

Equity Rule 46. "In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make

such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require." (3 U. S. Comp. Stats. 1916, § 1536, p. 2516; Foster's Federal Practice, 5th ed., § 352, p. 1130; Simkins' Federal Equity Suit, 3d ed., pp. 131, 294, 492, 496, 520, 714.)

§ 1044. Appointment of a Stenographer Under Equity Rule 50.

Equity Rule 50. "When deemed necessary by the court or officer taking testimony, a stenographer may be appointed who shall take down testimony in shorthand and, if required, transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript." (3 U. S. Comp. Stats. 1916, § 1536, p. 2518; Foster's Federal Practice, 5th ed., §§ 352, 420, pp. 1132, 1327.)

§ 1045. Affidavits of Expert Witnesses—Patent and Trademark Cases Under Equity Rule 48.

Equity Rule 48. "In a case involving the validity or scope of a patent or trade mark, the district court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavit shall not be used as evidence in the cause."

(3 U. S. Comp. Stats. 1916, § 1536, p. 2518; Foster's Federal Practice, 5th ed., § 352, p. 1131; Simkins' Federal Equity Suit, 3d ed., pp. 492, 519, 520.)

Under Rule 48, where the answer sets up matter which may be the subject of expert testimony, the court in its discretion may grant a motion to have expert's testimony set forth in affidavits and filed. (P. M. Co. v. Ajax Rail Anchor Co., 216 Fed. 634.)

In Todd v. Whitaker (E. D. Pa.), 217 Fed. 319, the court said:

"If a request for opportunity to make this inspection be denied, or if what is offered in evidence differs from what was submitted for inspection, the present rules furnish the means of preventing a plaintiff from being taken by surprise. . . . The discretion of the trial judge can readily afford all the additional protection required."

§ 1046. Pleading and Proof in Actions for Infringement Under § 4920, Rev. Stats.

§ 4920, Rev. Stats. "In any action for infringement the defendant may plead the general issue, and having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial any one or more of the following special matters:

"First. That for the purpose of deceiving the public the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or,

"Second. That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or

"Third. That it has been patented or described in some printed publication prior to his supposed invention or discovery thereof, or more than two years prior to his application for a patent therefor; or,

"Fourth. That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented; or,

"Fifth. That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public.

"And in notices as to proof or previous invention, knowledge, or use of the thing patented, the defendant shall state the names of the patentees and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where and by whom it had been used; and if any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him, with costs. And the like defenses may be pleaded in any suit in equity for relief against an alleged infringement; and proofs of the same may be given upon like notice in the answer of the defendant, and with the like effect." (Fed. Stats. Ann., 2d ed., "Patents"; 8 U. S. Comp. Stats. 1916, § 9466.)

CHAPTER 51.

MASTERS IN CHANCERY.

SEC.
1060. Appointment and Compensation Under Equity Rule 68.
1061. Reference of Exceptional Matters to, Under Equity Rule 59.
1062. Notice and Hearing of Reference Under Equity Rule 60.
1063. Regulation and Method of Proceedings Under Equity Rules 62, 63 and 64.
1064. Illustration of Exceptional Matters.
1065. Ruling as to Form of Accounts Before Master Under Equity Rule 68.

§ 1060. Appointment and Compensation Under Equity Rule 68.

Equity Rule 68. "The district courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof concurring in the appointment), and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master shall be fixed by the district court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court." (3 U. S. Comp. Stats. 1916, § 1536, p. 2524; Foster's Federal Practice, 5th ed., § 385, p. 1213; Simkins' Federal Equity Suit, 3d ed., p. 557.)

§ 1061. Reference of Exceptional Matters to, Under Equity Rule 59.

Equity Rule 59. "Save in matters of account, a reference to master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition

requires it. When such a reference is made, the party at whose instance or for whose benefit it is made shall cause the order of reference to be presented to the master for a hearing within twenty days succeeding the time when the reference was made, unless a longer time be specially granted by the court or judge; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference." (3 U. S. Comp. Stats. 1916, § 1536, p. 2521; Foster's Federal Practice, 5th ed., § 386, p. 1214; Simkins' Federal Equity Suit, 3d ed., pp. 558, 559, 561.)

§ 1062. Notice and Hearing of Reference Under Equity Rule 60.

Equity Rule 60. "Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or his solicitor; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay." (3 U. S. Comp. Stats. 1916, § 1536, p. 2522; Foster's Federal Practice, 5th ed., §§ 386, 388, pp. 1214, 1218; Simkins' Federal Equity Suit, 3d ed., p. 526.)

In the United States District Court, Southern District of California, Southern Division.

K. Company, a Corporation,
Complainant,
v.
Frank Doe,
Defendant.
} ORDER ON ACCOUNTING.

Before ——, Esq., Special Master.

Pursuant to the interlocutory decree entered and enrolled in the above-entitled suit and in furtherance of the references therein made for the purpose of taking and stating an account of the profits, gains, savings and advantages which the said defendants have derived, received or made since ——, 1916, by reason of or through the infringement of the letters patent, sued on in said suit and found in and by said interlocutory decree, by any manufacture, use or sale, or improvement to any or either of said devices containing and embodying the improvements described in said letters patent and claimed in the claim thereof, and for the purpose of assessing the damages which complainant has sustained since said date or shall sustain by reason of such infringement by the defendant, you, Frank Doe, are hereby ordered and directed to appear and attend before me at the hour —— o'clock P. M. on ——, May ——, 1917, at my office, Room ——, —— Building, Los Angeles, California, and bring with you and render an account or statement in writing under oath of the number of infringing devices or parts thereof made and the number sold by you in complete or contributory infringement of letters patent No. —— granted the —— day of ——, 1912, to the K. Company; the details of such manufacture and each manufacture and of such sales and each sale and of such use and each use and the total profits, gains, savings and advantages derived, received, realized or made by you in, by or by reason of, or through the manufacture or sale or use of each of said devices containing and embodying the improvements described in said letters patent and claimed in the claim thereof and infringed by you, and also set forth in detail specification in said account the following items:

1. The total number of devices containing and embodying the improvements in said letters patent and claimed in the claim thereof and the separate parts thereof made, sold or used by you and embraced within the claim of said letters patent No. —— referred to in the interlocutory decree herein to the date of the entry and enrollment of the interlocutory decree herein;

2. A statement showing to whom each of said infringing irrigating connections containing and embodying the improvements described in said letters patent and claimed in the claim thereof were sold, the dates of such sales, the actual cost of manufacture thereof, and the selling price received therefor.

And that you have with you at said time all the books, papers, documents, statements, exhibits, records, vouchers and other things referring to the sale of such irrigating connections, or any thereof, or such separate parts thereof, so directly or contributorily infringing such letters patent as aforesaid, or to the cost of manufacture, or to the sale thereof, or the amount, or amounts received by you therefrom in any manner, or to the number of such irrigating connections or parts thereof made by you, or on your behalf either in the county of Los Angeles, California, or elsewhere.

This order is directed to you, your attorneys, officers, directors, clerks, agents, servants, workmen, employees and associates and each of them as may stand in any relation to you in the premises; all in accordance with said interlocutory decree and the powers therein thereby conferred upon me and in accordance with the Rules 60, 62, 63 and 64 of the Rules of Practice for the Courts of Equity of the United States and statutes of the United States in such case made and provided.

Dated Los Angeles, California, ——, 1917.

——, Special Master.

§ 1063. Regulation and Method of Proceedings Under Equity Rules 62, 63 and 64.

Equity Rule 62. "The master shall regulate all the proceedings in every hearing before him, upon every reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce,* all witnesses produced by the parties before him, or by deposition, according to the acts of Congress, or otherwise, as here provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties." (3 U. S. Comp. Stats. 1916, § 1536, p. 2522; Foster's Federal Practice, 5th ed., § 388, p. 1217; Simkins' Federal Equity Suit, 3d ed., p. 563.)

Equity Rule 65. "The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce,* or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken

down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary." (3 U. S. Comp. Stats. 1916, § 1536, p. 2523; Simkins' Federal Equity Suit, 3d ed., pp. 520, 562.)

Equity Rule 63. "All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce,* or upon interrogatories, as the master shall direct." (3 U. S. Comp. Stats. 1916, § 1536, p. 2523; Foster's Federal Practice, 5th ed., § 389 et seq., pp. 1219, 1220; Simkins' Federal Equity Suit, 3d ed., p. 563.)

Equity Rule 64. "All affidavits, depositions, and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master." (3 U. S. Comp. Stats. 1916, § 1536, p. 2523; Simkins' Federal Equity Suit, 3d ed., p. 563.)

§ 1064. Illustration of Exceptional Matters. In Destructor Co. v. City of Atlanta (N. D. Ga.), 232 Fed. 746, it was held that "where the question at issue in a suit in equity was as to whether a refuse-burning plant built for a city fulfilled the requirements and warranties of the contract, which by its terms was to be determined by tests, and the contractor alleged that the city refused to co-operate in making such tests, it was within the power of the court to appoint a disinterested commission to make the tests and report the results bearing on all questions in dispute."

§ 1065. Ruling as to Form of Accounts Before Master. In Cushman & Denison Mfg. Co. v. Grammes (E. D. Pa.), 225 Fed. 883, at page 887, the court said:

"When the right of a plaintiff to an accounting is found, Rule 63 gives ample authority to require the defendant to file such account, and sufficiently designates its form and what it shall contain. In form it must be a debtor and creditor statement. The rule indicates that it shall be on the

basis of a cash statement of moneys received and disbursed. The analogue of an account stated by a sales agent or other fiduciary will afford a guide to what is required. If the account is accepted by the plaintiff, the profits have been ascertained, and this inquiry is at an end. If the statement is not acceptable, the case of a hearing upon exceptions to the account of any trustee supplies the required guide. The account, as stated by the defendants, is one thing. The evidence from which the master finds the facts upon which to base an account stated by him is another thing. Care should be taken to keep the distinction clear. The first should be a financial statement in cash account form simply. It should not be a list of possible witnesses, nor a statement of evidence, by which the items of the account may be vouched. The parties may call witnesses or offer evidence bearing upon accounting facts. Subpoenas may issue and include the usual *duces tecum* clauses. The production of books and papers may be compelled. Rules 62 and 63 and the ordinary rules which pertain to such matters apply. If a defendant objects to account, or a witness is asked to testify, or to produce books or papers, and objection is made, the question raised should be passed upon by the master. If the order of the master is met by a refusal to comply, the refusal may be certified to the court, or the opposite party may ask the master to find the facts and to state an account against the defendants from all the evidence before him.

"In making such orders, care should, of course, always be taken to preserve to each party all his rights. Under the guise of requiring an account, or eliciting facts through testimony and evidence, neither party should be required to disclose the course of his dealings, so that a rival or competitor may injure him or gain an unfair advantage. The test is always: Is the requirement relevant to the decision of the cause? Almost everything in such cases must in the first instance be left to the discretion of the trial judge, or of the master acting in that capacity. Bringing these abstractions to the concrete, we decline to adjudge the defendants to be in contempt because of what this record discloses, and are of opinion that the order requiring the defendants in their accounting to give the names and addresses of their customers should be revoked. The basis of the expressed willingness of the defendants to give the information does not warrant a contempt finding."

CHAPTER 52.

MASTER'S REPORT.

SEC.

1070. Master's Report—Exceptions—Costs, Under Equity Rules 61, 66, 67.
1071. Exceptions to Draft Report, not Sufficient, but must be Filed after the Report Itself is Filed.
1072. Report Confirmed if No Objections Filed but Subject to be Set Aside on Questions of Law.
1073. Master's Conclusions on Matters of Fact Presumed Correct.
1074. Equity Rule 66 Applies to Bankruptcy Matters.
1075. Effect of Master's Report When Reference by Consent or on Stipulation.

§ 1070. Master's Report — Exceptions — Costs, Under Equity Rules 61, 66 and 67.

Equity Rule 61. "In the reports made by the master to the court, no part of any state of facts, account, charge, affidavit, deposition, examination, or answer brought in or used before him shall be stated or recited. But such state of facts, account, charge, affidavit, deposition, examination, or answer shall be identified, and referred to, so as to inform the court what state of facts, account, charge, affidavit, deposition, examination, or answer were so brought in or used." (3 U. S. Comp. Stats. 1916, § 1536, p. 2522.)

Equity Rule 66. "The master, as soon as his report is ready, shall return the same into the clerk's office and the day of the return shall be entered by the clerk in the equity docket. The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise." (3 U. S. Comp. Stats. 1916, § 1536, p. 2523; Foster's Federal Practice, 5th ed., § 392, p. 1231; Simkins' Federal Equity Suit, 3d ed., pp. 564, 565, 568, 569, 571.)

Equity Rule 67. "In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay,

the party whose exceptions are overruled, shall, for every exception overruled, pay five dollars costs to the other party, and for every exception allowed shall be entitled to the same costs." (3 U. S. Comp. Stats. 1916, § 1536, p. 2524; Foster's Federal Practice, 5th ed., § 355, p. 1149; Simkins' Federal Equity Suit, 3d ed., pp. 566, 567, 573.)

§ 1071. Exceptions to Draft Report, not Sufficient, but must be Filed After the Report Itself is Filed. Under Equity Rule 66, requiring the master to return his report into the clerk's office, and giving the parties twenty days from the time of the filing of the report to file exceptions thereto, exceptions to the report must be filed within the time fixed, and exceptions to the master's draft or proposed report merely give him an opportunity to correct his report and are insufficient to present any objections to the report. (Decker v. Smith (N. D. N. Y.), 225 Fed. 776.)

§ 1072. Report Confirmed if No Objections Filed but Subject to be Set Aside on Questions of Law. The report of a special master, to which no exceptions have been filed, stands confirmed, but under Equity Rule 66, the court may decline to follow its result, if satisfied that the decision of the master on the question of law upon which it depends was wrong. (Isaac McLean Sons Co. v. William S. Butler & Co. (D. Mass.), 227 Fed. 325.)

§ 1073. Master's Conclusions on Matters of Fact Presumed Correct. The conclusions of a master on matters of fact have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part. (Grushlaw v. Phoenix Knitting Works (3d Cir.), 223 Fed. 513, 516, 139 C. C. A. 61.)

§ 1074. Equity Rule 66 Applies to Bankruptcy Matters. Equity Rule 66 provides that parties shall have twenty days from the time of filing the report of the master to file exceptions thereto, and, if none are filed within that period, the report shall stand

confirmed. Held that, where an application for discharge of a bankrupt was referred to the referee as a special master to take testimony and report the same with his findings of fact, together with his recommendations in favor of or against the discharge, exceptions to the referee's report must be filed, if at all, within 20 days after the filing of the report. (In re Pierce, 210 Fed. 389, 390.)

§ 1075. Effect of Master's Report When Reference by Consent or on Stipulation. Where by consent of the parties an order was entered appointing a special master with power to hear and consider all testimony whether taken by himself or by deposition, to view all physical evidence offered, to inspect the premises involved in the suit, and to report all testimony with exhibits, together with his findings of fact and conclusions of law, his findings of fact were conclusive upon the court, unless unsupported by any legal evidence, or contrary to all the evidence, and his conclusions of law, based upon the facts so found, only were reviewable on exceptions.

Exceptions to the report of a master which present questions of law only are not a waiver of the conclusive effect of his findings of fact. (Hattiesburg Lumber Co. v. Herrick (5th cir.), 212 Fed. 834, 129 C. C. A. 288.)

When, pursuant to a stipulation of the parties, all of the issues in a suit in equity are referred to a master, to take the proofs and report the same, together with his findings, his findings of fact are not subject to be set aside and disregarded at the mere discretion of the court; but so far as a finding depends on conflicting testimony or on the credibility of witnesses, or so far as there is any competent testimony consistent with a finding, it must be treated as unassailable. Nor may the court disregard such findings, and proceed to make findings of its own, because the master failed to make findings on all the issues, or for other insufficiency in his report; but in such case the cause should be resubmitted, with proper instructions. (Connor v. United States (9th Cir.), 214 Fed. 522, 524, 131 C. C. A. 68.)

CHAPTER 53.

RECEIVERS.

SEC.

1080. Persons Ineligible to Act as Receivers.
1081. Receivers Manage Property According to State Laws.
1082. Rights of Employees on Properties in Hands of Receivers to be Heard on Terms of Employment.
1083. Receivers—When Suable Without Leave of Court.

§ 1080. Persons Ineligible to Act as Receivers.

§ *68. Jud. Code.* "No clerk of a district court of the United States or his deputy shall be appointed a receiver or master in any case, except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment." (36 Stats. 1105; 5 Fed. Stats. Ann., 2d ed., p. 548; 1 U. S. Comp. Stats. 1916, § 1050.)

Part § 20, Act May 28, 1896, c. 252. "It shall not be lawful to appoint any of the officers named in this section (marshal, deputy marshal, attorney, or assistant attorney of any district; jury commissioner, marshal's clerk, bailiff, crier, juror, janitor of a public building, civil or military employee of the government, or clerk or employee of any United States justice or judge) receiver or receivers in any case or cases now pending or that may hereafter be brought in the courts of the United States." (4 Fed. Stats. Ann., 2d ed., p. 635; 2 U. S. Comp. Stats. 1916, § 1334.).

§ 1081. Receivers Manage Property According to State Laws.

§ *65, Jud. Code (Re-enacting 35 Stats. 436).* "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who

shall wilfully violate any provision of this section shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both." (36 Stats. 1104; 5 Fed. Stats. Ann., 2d ed., p. 540; 1 U. S. Comp. Stats. 1916, § 1047; Foster's Federal Practice, 5th ed., p. 1007.)

§ 1082. Rights of Employees on Properties in Hands of Receivers to be Heard on Terms of Employment.

§ *9, Act July 15, 1913, c. 6.* "That whenever receivers appointed by a Federal court are in the possession and control of the business of employers covered by this act the employees of such employers shall have the right to be heard through their representatives in such court upon all questions affecting the terms and conditions of their employment; and no reduction of wages shall be made by such receivers without the authority of the court therefor, after notice to such employees, said notice to be given not less than twenty days before the hearing upon the receivers' petition or application, and to be posted upon all customary bulletin boards along or upon the railway or in the customary places on the premises of other employers covered by this act." (38 Stats. 107; 6 Fed. Stats. Ann., 2d ed., p. 267; 8 U. S. Comp. Stats. 1916, § 8674.)

§ 1083. Receivers—When Suable Without Leave of Court.

§ *66, Jud. Code* (*Re-enacting 25 Stats. 436*). "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice." (36 Stats. 1104; 5 Fed. Stats. Ann., 2d ed., p. 541; 1 U. S. Comp. Stats. 1916, § 1048; Foster's Federal Practice, 5th ed., pp. 167, 215, 1012; Simkins' Federal Equity Suit, 3d ed., pp. 162, 181, 256.)

CHAPTER 54.

INJUNCTIONS.

SEC.
1100. Power of Federal Courts to Issue Writs—In General.
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1102. Injunctions Under the Clayton Act.
1103. Preliminary Injunctions and Temporary Restraining Orders—Notice.
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1118. Tax Assessment or Collection may not be Enjoined.
1119. Injunctions on Distress Warrant Against Officer for Failure to Account for Public Moneys—Procedure.
1120. Procedure upon Refusal to Grant, or on Dissolution of Such Injunction.
1121. Injunction Against Violation of Prohibition Laws.
1122. Forms—Interlocutory and Perpetual Injunctions.

§ 1100. Power of Federal Courts to Issue Writs—In General.

Part § 262, Jud. Code (Drawn from § 716, Rev. Stats., and § 12, Act. Mch. 3, 1891, c. 517). " . . . The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." (36 Stats. 1162; 5 Fed. Stats. Ann., 2d ed., p. 928;

2 U. S. Comp. Stats. 1916, § 1239; Foster's Federal Practice, 5th ed., pp. 8, 1469, 1527, 2413; Simkins' Federal Equity Suit, 3d ed., p. 41.)

§ 1101. Injunctions—When may be Granted by Justice or Judge Instead of by Court.

§ *264, Jud. Code (Drawn from § 719, Rev. Stats.).* "Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any judge of a district court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the district judge of the district. In case of the absence from the district of the district judge, or of his disability, any circuit judge of the circuit in which the district is situated may grant an injunction or restraining order in any case pending in the district court, where the same might be granted by the district judge." (36 Stats. 1162; 5 Fed. Stats. Ann., 2d ed., p. 954; 2 U. S. Comp. Stats. 1916, § 1241; Foster's Federal Practice, 5th ed., pp. 812, 816, 902.)

§ 1102. Injunctions Under the Clayton Act.

§ 15, *Act October 15, 1914, c. 323 (Clayton Act).* [*Injunctions—Courts—Duty of district attorneys—Parties defendant.*] "That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case;

and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof." (38 Stats. 736; 8 U. S. Comp. Stats. 1916, § 8835n, p. 9694.)

§ 16, *Act Oct. 15, 1914 (Clayton Act).* [*Injunctive relief by private parties.*] "That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect to any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." (38 Stats. 737; 8 U. S. Comp Stats. 1916, § 8835o, p. 9697.)

§ 17, *Act Oct. 15, 1914 (Clayton Act).* [*Preliminary injunctions and temporary restraining orders—Notice.*] "That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result

to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

Section two hundred and sixty-three of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

Nothing in this section contained shall be deemed to alter, repeal, or amend section two hundred and sixty-six of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven." (38 Stats. 737; 6 Fed. Stats. Ann., 2d ed., p. 139; 2 U. S. Comp. Stats. 1916, § 1243a, p. 1962.)

§ 18, *Act of Oct. 15, 1914 (Clayton Act)*. [*Restraining orders, etc.—Security as condition precedent.*] "That, except as otherwise provided in section 16 of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered

by any party who may be found to have been wrongfully enjoined or restrained thereby." (38 Stats. 738; 6 Fed. Stats. Ann., 2d ed., p. 140; 2 U. S. Comp. Stats. 1916, § 1243b, p. 1963.)

§ 19, *Act of Oct. 15, 1914 (Clayton Act).* [*Restraining orders, etc.—Contents.*] "That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same." (38 Stats. 738; 6 Fed. Stats. Ann., 2d ed., p. 140; 2 U. S. Comp. Stats. 1916, § 1243c, p. 1943.)

§ 20, *Act of Oct. 15, 1914 (Clayton Act).* [*Restraining orders, etc.—When not to issue.*] "That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and

lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." (38 Stats. 738; 6 Fed. Stats. Ann., 2d ed., p. 141; 2 U. S. Comp. Stats. 1916, § 1243d, p. 1964.)

§ 1103. Preliminary Injunctions and Temporary Restraining Orders—Notice.

Part Equity Rule 73. "No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. . . . " (3 U. S. Comp. Stats. 1916, § 1536, p. 2526; Foster's Federal Practice, 5th ed., §§ 255, 257, 291, pp. 815, 817, 905; Simkins' Federal Equity Suit, 3d ed., p. 474.)

Under Equity Rule 73, a court of equity is without power to issue an injunction unless there is a properly verified bill upon which to base the same. (Cathey v. Norfolk & W. Ry. Co. (4th Cir.), 228 Fed. 26, 29, 142 C. C. A. 482.)

A restraining order was issued without notice and without any averment of immediate and irreparable loss, restraining defendant from selling a patent obtained while in complainant's employ and while under contract to assign to complainant any patent obtained on inventions while in complainant's employ. Under Rule 73 the record showed that complainant would be remediless and would suffer such loss, and the restraining order without notice and preliminary injunction were properly granted. (Thullen v. Triumph Electric Co. (3d Cir.), 212 Fed. 143, 128 C. C. A. 655.)

Under Rule 73, motion made to dissolve, court held that a temporary restraining order granted under § 263, Jud. Code (repealed by the Clayton Act, § 1102, *supra*), ceases without further order of the court on the hearing of the motion for temporary injunction. (Pack v. Carter (9th Cir.), 223 Fed. 638, 139 C. C. A. 184.)

§ 1104. Procedure Where Order Granted Without Notice.

Part Equity Rule 73. " . . . In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. . . . " (3 U. S. Comp. Stats. 1916, § 1536, p. 2526; Foster's Federal Practice, 5th ed., §§ 255, 257, 291, pp. 815, 817, 905.)

§ 1105. Dissolution and Modification of Temporary Restraining Orders. In addition to the penalty of dissolution prescribed by the preceding section, a temporary restraining order may be dissolved or modified in accordance with the following rule:—

Part Equity Rule 73. " . . . Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. . . . " (3 U. S. Comp. Stats. 1916, § 1536, p. 2526; Foster's Federal Practice, 5th ed., §§ 255, 257, 291, pp. 815, 817, 905; Simkins' Federal Equity Suit, 3d ed., p. 475.)

§ 1106. Order to be Filed Forthwith.

Part Equity Rule 73. " . . . Every temporary restraining order shall be forthwith filed in the clerk's office." (3 U. S. Comp. Stats. 1916, § 1536, p. 2526; Foster's Federal

Practice, 5th ed., §§ 255, 257, 291, pp. 815, 817, 905; Simkins' Federal Equity Suit, 3d ed., p. 474.)

§ 1107. Injunction Pending Appeal.

Equity Rule 74. "When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party." (3 U. S. Comp. Stats. 1916, § 1536, p. 2527; Simkins' Federal Equity Suit, 3d ed., p. 629.)

§ 1108. When Proceedings in State Courts may be Stayed.

§ *265, Jud. Code* (*Re-enacting* § *270, Rev. Stats.*). "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." (36 Stats. 1162; 5 Fed. Stats. Ann., 2d ed., p. 959; 2 U. S. Comp. Stats. 1916, § 1242; Foster's Federal Practice, 5th ed., p. 856; Simkins' Federal Equity Suit, 3d ed., pp. 475, 476.)

§ 1109. Injunction to Restrain Enforcement of State Laws on Ground of Unconstitutionality—By Whom Granted.

First Part § *266, Jud. Code* (*Re-enacting* § *17, Act June 18, 1910, c. 309*). "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the uncon-

stitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge." (36 Stats. 1162, as amended by Act March 4, 1913, c. 160, 37 Stats. 1013; 5 Fed. Stats. Ann., 2d ed., p. 983; 2 U. S. Comp. Stats. 1916, § 1243; Foster's Federal Practice, 5th ed., pp. 397, 906; Simkins' Federal Equity Suit, 3d ed., pp. 471, 472, 473, 475.)

Last Part § 266, Added by Amendment of March 4, 1913, c. 160; 37 Stats. 1013. "It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the state having jurisdiction thereof under the laws of such state, to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the state. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the state, that the suit in the state courts is not being prosecuted with diligence and good faith." (5 Fed. Stats. Ann., 2d ed., p. 983; 2 U. S. Comp. Stats. 1916, § 1243; Foster's Federal Practice, 5th ed., pp. 397, 906; Simkins' Federal Equity Suit, 3d ed., pp. 471, 472, 473, 475.)

§ 1110. Hearing of Application in Such Cases—Notice.

Part § 266, Jud. Code. "Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be de-

fendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for." (36 Stats. 1162; 5 Fed. Stats. Ann., 2d ed., p. 984; 2 U. S. Comp. Stats. 1916, § 1243; Foster's Federal Practice, 5th ed., pp. 397, 906; Simkins' Federal Equity Suit, 3d ed., pp. 471, 472, 473, 475.)

§ 1111. Appeal from Order Granting or Denying Injunction in Such Cases.

Part § 266, Jud. Code. "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case." (36 Stats. 1162; 5 Fed. Stats. Ann., 2d ed., p. 983; 2 U. S. Comp. Stats. 1916, § 1243; Foster's Federal Practice, 5th ed., pp. 397, 906; Simkins' Federal Equity Suit, 3d ed., pp. 471, 472, 473, 475.)

§ 1112. Enforcement of Injunction.

Equity Rule 7. "The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill; and, unless otherwise provided in these rules or specially ordered by the court, a writ of attachment and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court." (3 U. S. Comp. Stats. 1916, § 1536,

p. 2498; Foster's Federal Practice, 5th ed., pp. 570, 574; Simkins' Federal Equity Suit, 3d ed., pp. 312, 590.)

Equity Rule 8. "Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the district court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found a writ of sequestration shall issue against his estate, upon the return of *non est inventus*, to compel obedience to the decree. If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done, be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him." (3 U. S. Comp. Stats. 1916, § 1536, p. 2498; Foster's Federal Practice, 5th ed., pp. 209, 814, 1262, 1272, 1345, 1353, 1364, 1365, 1385, 1387; Simkins' Federal Equity Suit, 3d ed., pp. 585, 590, 591, 593, 771.)

§ 1113. Writs of Ne Exeat—When and by Whom Granted.

§ *261, Jud. Code* (*Re-enacting* § *717, Rev. Stats.*). "Writs of ne exeat may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any district judge, in cases where they might be granted by the district court of which he is a judge. But

no writ of ne exeat shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States." (36 Stats. 1162; 5 Fed. Stats. Ann., 2d ed., p. 926; 2 U. S. Comp. Stats. 1916, § 1238; Foster's Federal Practice, 5th ed., p. 1045; Simkins' Federal Equity Suit, 3d ed., pp. 284, 285, 480, 481.)

§ 1114. Writs of Scire Facias—By What Courts Issuable.

Part § 262, Jud. Code. "The Supreme Court and the district courts shall have power to issue writs of scire facias." (36 Stats. 1162; 5 Fed. Stats. Ann., 2d ed., p. 928; 2 U. S. Comp. Stats. 1916, § 1239; Foster's Federal Practice, 5th ed., pp. 8, 1469, 1527, 2413; Simkins' Federal Equity Suit, 2d ed., p. 41.)

§ 1115. Power of Courts to Administer Oaths and Punish for Contempt.

§ *268, Jud. Code.* "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided,* That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts." (36 Stats. 1162; 5 Fed. Stats. Ann., 2d ed., p. 1009; 2 U. S. Comp. Stats. 1916, § 1245; 2 Foster's Federal Practice, 5th ed., § 428, p. 1354; Simkins' Federal Equity Suit, 3d ed., pp. 471, 472, 473, 475.)

§ 22, *Act of Oct. 15, 1914 (Clayton Act).* [*Contempt—Procedure.*] "That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer, on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to

believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however,* That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months: *Provided,* That in any case the court or a judge thereof may, for good

cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance." (38 Stats. 738; 6 Fed. Stats. Ann., 2d ed., p. 142; 2 U. S. Comp. Stats. 1916, § 1245c, p. 2008.)

§ 23, *Act of Oct. 15, 1914* (*Clayton Act*). [*Contempt—Review of conviction—Bail.*] "That the evidence taken upon the trial of any persons so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia." (38 Stats. 739; 6 Fed. Stats. Ann., 2d ed., p. 142; 2 U. S. Comp. Stats. 1916, § 1245c, p. 2009.)

§ 24, *Act of Oct. 15, 1914* (*Clayton Act*). [*Contempts—Existing statutes when applicable.*] "That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing." [38 Stats. 739; 6 Fed. Stats. Ann., 2d ed., p. 143; 2 U. S. Comp. Stats. 1916, § 1245d, p. 2009.)

§ 25, *Act of Oct. 15, 1914 (Clayton Act)*. [*Contempts—Statute of limitations—Other suits—Pending proceedings.* "That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act." (38 Stats. 740; 6 Fed. Stats. Ann., 2d ed., p. 143; 2 U. S. Comp. Stats. 1916, § 1245e, p. 2009.)

§ 1116. Injunction Restraining Receivership Proceedings Against National Banks.

§ *5237, Rev. Stats.* "Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven, apply to the nearest circuit, or district, or territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented in the lawful money of the United States, shall make an order enjoining the Comptroller, and any receiver acting under his direction, from all further proceedings on account of such alleged refusal." (6 Fed. Stats. Ann., 2d ed., p. 872; 9 U. S. Comp. Stats. 1916, § 9824.)

§ 1117. No Interlocutory Injunction Against National Banks in State Courts.

Part § *5242, Rev. Stats.* "No . . . injunction . . . shall be issued against such association (national bank) or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court." (6 Fed. Stats. Ann., 2d ed., p. 903; 9 U. S. Comp. Stats. 1916, § 9834.)

§ 1118. Tax Assessment or Collection may not be Enjoined.

§ *3224, Rev. Stats.* "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." (3 Fed. Stats. Ann., 2d ed., p. 1032; 6 U. S. Comp. Stats. 1916, § 5947.)

This section applies only to federal taxation. (Shelton v. Platt, 139 U. S. 597, 35 **L. Ed.** 273, 11 Sup. Ct. 646; Schulenberg-Boeckler Lumber Co. v. Hayward, 20 Fed. 422; State R. R. Tax Cases, 92 U. S. 575, 23 **L. Ed.** 663.)

It is doubtful, inasmuch as it is contained in that part of the Revised Statutes relating to internal revenue, whether it applies to other forms of taxation.

§ 1119. Injunctions on Distress Warrant Against Officer for Failure to Account for Public Moneys—Procedure.

§ *3636, Rev. Stats.* "Any person who considers himself aggrieved by any warrant of distress issued under the foregoing provisions may prefer a bill of complaint to any district judge of the United States, setting forth therein the nature and extent of the injury of which he complains; and thereupon the judge may grant an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires. But no injunction shall issue till the party applying for it gives bond, with sufficient security, in a sum to be prescribed by the judge, for the performance of such judgment as may be awarded against him; nor shall the issuing of such injunction in any manner impair the lien produced by the issuing of the warrant. And the same proceedings shall be had on such injunction as in other cases, except that no answer shall be necessary on the part of the United States; and if, upon dissolving the injunction, it appears to the satisfaction of the judge that the application for the injunction was merely for delay, the judge may add to the lawful interest assessed on all sums found due against the complainant such damages as, with such lawful interest, shall not exceed the rate of ten per centum a year. Such injunction may be granted or dissolved by the district judge either in or out of court." (Fed. Stats. Ann., 2d ed., "Public Moneys"; 7 U. S. Comp. Stats. 1916, § 6635.)

§ 1120. Procedure upon Refusal to Grant, or on Dissolution of Such Injunction.

§ *3637, Rev. Stats.* "When the district judge refuses to grant an injunction to stay proceedings on a distress warrant, as aforesaid, or dissolves such injunction after it is granted, any person who considers himself aggrieved by the decision in the premises may lay before the circuit justice, or circuit judge of the circuit within which such district lies, a copy of the proceeding had before the district judge; and thereupon the circuit justice or circuit judge may grant an injunction or permit an appeal, as the case may be, if, in his opinion, the equity of the case requires it. The same proceedings, subject to the same conditions, shall be had upon such injunction in the circuit court as are prescribed in the district court." (Fed. Stats. Ann., 2d ed., "Public Moneys"; 7 U. S. Comp. Stats. 1916, § 6636.)

The appellate powers of the circuit court herein referred to were, by act of 1891, vested in the circuit courts of appeals, and Supreme Court.

§ 1121. Injunction Against Violation of Prohibition Laws.

Alaska.

§ *20, Act Feb. 14, 1917, c.* ——. "That any United States District Attorney for the Territory of Alaska may maintain an action in equity in the name of the United States to abate and perpetually enjoin such a nuisance as defined in the preceding section. No bond shall be required. Any person violating the terms of any injunction granted in such proceedings shall be punished for contempt by a fine of not more than $500 or by imprisonment in the Federal jail for not more than six months, or both such fine and imprisonment, in the discretion of the court." (Pamphlet Supp., Fed. Stats. Ann., Nos. 9, 10, pp. 9, 10.)

District of Columbia.

Act Mch. 3, 1917, c. 165, § *14.* "The United States district attorney for the District of Columbia, or any citizen of the District of Columbia, may maintain an action in equity in the

name of the United States to abate and perpetually enjoin such a nuisance as defined in the preceding section. The injunction shall be granted at the commencement of the action, and no bond shall be required. Any person violating the terms of any injunction granted in such proceedings shall be punished for contempt by a fine of not less than $100 nor more than $500 and by imprisonment in the District jail or workhouse for not less than thirty days nor more than six months, in the discretion of the court." (U. S. Comp. Stats. 1916, §§ 3369kk, Advance Sheets 239, Fed. No. 2, Supp. p. 125.)

Act Mch. 3, 1917, c. 165, § 15. Restraining violations of Act. "When any violation of this Act is threatened, or shall have occurred, or is occurring, the doing of, or the continuance or repetition of the unlawful act, or any of like kind by the offending party may be prevented by a writ of injunction out of a court of equity upon a bill filed in all respects as in cases of liquor nuisances; in like manner the writ of injunction may be employed to compel obedience to any provision of this Act." (U. S. Comp. Stats. 1916, § 33691, Advance Sheets 239, Fed. No. 2, Supp. p. 125.)

§ 1122. Forms—Interlocutory and Perpetual Injunctions.

United States District Court, Southern District of California, Southern Division.

In Equity—No. ——.

K. Company, a Corporation,
Complainant,
v.
Frank Doe,
Defendant.

INTERLOCUTORY DECREE SUSTAINING PATENT.

This cause having come on to be heard, upon the pleadings, proceedings and proofs herein filed on behalf of both parties, and after hearing ——, Esq., counsel for complainant, and ——, Esq., counsel for defendant, and after due proceedings had, upon consideration, on motion of ——, Esq., solicitor and counsel for complainant, and due deliberation had, it is hereby

Ordered, adjudged and decreed, as follows:

First. That the letters patent of the United States of America, issued to ——, assignor to K. Company, his assignee, on the —— day of ——, 1912, for new and useful improvements in irrigating connections, No. —— and assigned

to the complainant K. Company, a corporation, are good and valid in law, the claim of which is as follows: [Statement of Claim.]

Second. That the said —— was the first true and original inventor of the invention and improvement described and claimed in said letters patent, and particularly recited in the claim thereof.

Third. That the complainant the K. Company, a corporation duly organized and existing under and by virtue of the laws of the state of California, and having its principal place of business in the city of Los Angeles, county of Los Angeles, state of California, is the lawful owner of said letters patent, and is entitled to the exclusive rights in, to and under said letters patent, and in and to the invention and improvements secured thereby.

Fourth. That the defendant Frank Doe has infringed upon said letters patent, and the claim thereof, and upon the exclusive rights of the complainant under same, by manufacturing, using and vending to others to be used, irrigating connections, containing and embodying the improvements described in said letters patent and particularly claimed in the claim thereof.

Fifth. That the complainant do recover of the defendant the profits, gains, savings and advantages which the said defendant has derived, received or made since ——, 1912, by reason of the infringement of the exclusive rights under said letters patent, by any manufacture, use or sale, or inducement to any or either of said acts, of irrigating connections, containing and embodying the improvements described in said letters patent and claimed in the claim thereof, and that complainant do recover of said defendant any and all damages which the complainant has sustained since said date by reason of such infringement of its exclusive rights, by said defendant.

Sixth. And it is hereby referred to ——, a master of this court, who is hereby appointed to take, ascertain and state the number of infringing devices or parts thereof made, and the number sold by the said defendant in infringement of the claim of said letters patent, and the number of such infringing devices or parts thereof which the said defendant have on hand, and the gains, profits, savings and advantages derived by the said defendant from and through said infringement, and to assess the damages thereby suffered by the said complainant and to report thereon to this court with all convenient speed.

And the said defendant, his agents, attorneys, clerks, servants, workmen, and employees, are hereby directed and required to attend before the said master from time to time as required by him, and to produce before him such books, papers, statements, exhibits, vouchers and documents as they may be directed by said master to produce, and to submit to such oral or other examination as the master may direct.

Seventh. That a perpetual injunction issue out of and under the seal of this court, directed to said defendant Frank Doe, his associates, officers, agents, attorneys, clerks, servants, workmen and employees, enjoining and restraining

them and each of them from directly or indirectly making or causing to be made, using or causing to be used, advertising for sale, vending or causing to be sold in any manner, any articles, devices or parts thereof containing and employing or embodying the said invention and improvements described in said letters patent, No. ——, and claimed in the claim thereof, and from counterfeiting or imitating the said invention and improvements or any part or parts thereof in any way, or from infringing upon or violating the said letters patent in any way whatsoever.

Eighth. That the complainant do recover of the defendant the costs, charges and disbursements of this suit to be taxed, and that the question of increase of damages and all further questions be reserved until the coming in of the master's report.

——, United States District Judge.

O. K. as to form.

——, Solicitor for Defendant.

United States District Court, Southern District of California, Southern Division.

In Equity—No. ——.

K. Company, a Corporation, Complainant,
v.
Frank Doe, Defendant.
} PERPETUAL INJUNCTION.

The President of the United States of America to Frank Doe, His Agents, Attorneys, Clerks, Servants, Workmen and Employees, Greeting:

Whereas it has been represented to us in our district court of the United States for the Southern District of California, Southern Division, that letters patent of the United States were issued to ——, assignor to K. Company, his assignee, for new and useful improvements in irrigating connections, dated the —— day of ——, 1912, No. ——, the claim of which is as follows: [Describe claim]; of which the plaintiff is the sole and exclusive owner, and that the plaintiff is also the owner of all rights to recover damages and profits from all infringers of said letters patent (as well prior as subsequent to the assignment of said letters patent to plaintiff); that said letters patent are good and valid, and have been infringed by the defendants herein by the manufacture, use and sale of irrigating connections, containing and embodying said invention:

Now, therefore, we do strictly command and enjoin you, the said Frank Doe, your agents, attorneys, clerks, servants, workmen and employees, for the remainder of the term of the life of said letters patent from further infringing the same, from directly or indirectly making or causing to be made, using or causing to be used, advertising for sale, vending or causing to be sold in

any manner, any articles, devices or parts thereof containing and employing or embodying the said invention and improvements described in said letters patent No. ——, and claimed in the claim thereof, and from counterfeiting or from imitating the said invention and improvements or any part or parts thereof in any way, or from infringing upon or violating the said letters patent in any way whatsoever;

Witness the Honorable ——, Judge of the district court of the United States, this —— day of ——, 1916, and in the 140th year of the Independence of the United States of America.

[Seal] Attest: ——, Clerk.

CHAPTER 55.

DISMISSAL BY PLAINTIFF.

SEC.

1130. Generally Plaintiff may Dismiss at any Time Before Decree on the Merits.
1131. After Master's Report Filed Voluntary Dismissal by Plaintiff not Allowed.

§ 1130. Generally Plaintiff may Dismiss at Any Time Before Decree on the Merits. The right of a complainant to dismiss without prejudice, at least before the case has reached a stage where the court could render a final decree on the merits, is not subject to the imposition of conditions other than the payment of costs.

A party is protected under the general rules of evidence in the right to use depositions taken in a former case between the same parties, where the testimony would not otherwise be procurable; but the relevancy of such testimony must be determined in the case in which it is offered. (Young v. Samuels & Bro. (D. R. I.), 232 Fed. 784, and cases cited.)

§ 1131. After Master's Report Filed Voluntary Dismissal by Plaintiff not Allowed. After the reference of a suit to a master to hear and determine all issues of fact and law, and after the master on evidence submitted by both parties had made his report containing a number of findings, including a general one in favor of defendants, and after plaintiff had filed exceptions thereto, the court should not permit plaintiff to dismiss his bill without prejudice, as such a discontinuance of the case involved more for the defendant than the incidental annoyance of a second litigation upon the same subject matter, and would be manifestly prejudicial to defendant, since it deprived him of the benefit of findings in his favor which were *prima facie* correct, and could not be set aside or modified unless error or mistake clearly appeared. (Smith v. Carlisle (5th Cir.), 228 Fed. 666, 143 C. C. A. 188.)

CHAPTER 56.

DECREE—EQUITY SUITS.

SEC.
1140. Rules as to Form of Decree.
1141. Findings.
1142. Drafting the Decree.
1143. Enforcement.
1144. Enforcement on Conditions.
1145. Decree Outside the Issues Invalid.
1146. Retaining Case to Afford Complete Relief.
1147. Lien of Decree not Divested by Creation of a New District or Division Nor by the Division or Transfer of Territory.

§ 1140. Rules as to Form of Decree.

Equity Rule 71. Form of Decree. "In drawing up decrees and orders, neither the bill nor answer nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: 'This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, *viz.:*' " (Here insert the decree or order.) (3 U. S. Comp. Stats. 1916, § 1536, p. 2526; Simkins' Federal Equity Suit, 3d ed., p. 584.)

Equity Rule 10. Decree for Deficiency in Foreclosures, etc. "In suits for the foreclosure of mortgages, or the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in Rule 8 when the decree is solely for the payment of money." (3 U. S. Comp. Stats. 1916, § 1536, p. 2499; Foster's Federal Practice, 5th ed., p. 1273; Simkins' Federal Equity Suit, 3d ed., p. 585.)

Part Equity Rule 8. " . . . If the decree be for the performance of any specific act, as, for example, for the execution

of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done. . . . " (3 U. S. Comp. Stats. 1916, § 1536, p. 2498; Foster's Federal Practice, 5th ed., pp. 814, 1272, 1364; Simkins' Federal Equity Suit, 3d ed., pp. 584, 590, 591.)

Under Rule 8 it was held in Richards v. Harrison (S. D. Iowa), 218 Fed. 134, that the omission of a recital in a judgment for a writ of execution was immaterial because this rule provides that when the judgment is for the payment of money only it shall be enforced by writ of execution.

§ 1141. Findings. In Liebing v. Matthews (8th Cir.), 216 Fed. 1, 12, 132 C. C. A. 245, the court said: "There is no rule in equity that the court shall in its decree find all the facts necessary to sustain the decree except where, as in Peirsoll v. Elliott, 6 Pet. (U. S.) 95, 8 **L. Ed.** 332, in the absence of a finding of facts, it would be impossible to tell what the decree in fact meant."

§ 1142. Drafting the Decree. The decree should be drawn by the solicitor of the successful party. It should then be submitted to opposing counsel and if he has any objections not admitted by counsel drawing the decree, such objections should be noted and submitted to the court for settlement. On settlement of objections, or if none are made, the decree is presented to the judge for signature and delivered to the clerk for filing and record in the equity journal. (Equity Rule 3, Cl. 3.)

§ 1143. Enforcement.

Equity Rule 8. Enforcement of Final Decrees. "Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the district court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which

the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found a writ of sequestration shall issue against his estate, upon the return of *non est inventus,* to compel obedience to the decree. If a mandatory order, injunction, or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done, be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him." (3 U. S. Comp. Stats. 1916, § 1536, p. 2498; Foster's Federal Practice, 5th ed., pp. 209, 814, 1262, 1272, 1345, 1364, 1385, 1387; Simkins' Federal Equity Suit, 3d ed., pp. 585, 590, 591, 593, 771.)

Equity Rule 9. Writ of Assistance. "When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court." (3 U. S. Comp. Stats. 1916, § 1536, p. 2499; Foster's Federal Practice, 5th ed., pp. 1385, 1386; Simkins' Federal Equity Suit, 3d ed., pp. 584, 590, 592.)

§ 1144. Enforcement on Conditions. In Union Cent. Life Ins. Co. v. Drake (8th Cir.), 214 Fed. 536, 131 C. C. A. 82, the court held that, a court of equity may, in a case where the rules and principles of equity demand it, condition its grant of relief sought by the plaintiff with the enforcement of a claim or equity held by a defendant which by reason of the statute of limitations, an adjudication, or otherwise, the latter could not enforce in any other way.

§ 1145. Decree Outside the Issues Invalid. In Mitchell v. Hitchman Coal & Coke Co., 214 Fed. 685, 131 C. C. A. 425, the court held that a decree determining that a labor union was an unlawful combination or conspiracy in restraint of trade in violation of the Sherman Anti-Trust Law (Act July 2, 1890, c. 647, 26 Stats. 209), could not be sustained where there was no allegation of defendant's violation of such law in the pleadings.

§ 1146. Retaining Case to Afford Complete Relief. In St. Louis etc. Ry. v. Bellamy, 211 Fed. 172, a preliminary injunction was granted upon the petition of a railroad company enjoining the enforcement of a rate. Later the bill was dismissed and the injunction dissolved. Held that, under Equity Rule 10, providing that "every person not being a party in any cause . . . in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause," the court had jurisdiction to retain the cause after dismissal of the bill for the purpose of enforcing the claims of all shippers and passengers under the bonds, and that in aid of such jurisdiction it had power to enjoin individual claimants from maintaining separate suits in the state courts.

§ 1147. Lien of Decree not Divested by Creation of a New District or Division nor by the Division or Transfer of Territory. By § 60, Jud. Code, already quoted in § 70, *supra*, it is provided that the lien of a decree, etc., shall not be divested by a change of boundaries of any territory, and that a certified copy thereof may be filed in the proper court of the division or district in which the property is located after such transfer, and have the same effect as an original.

CHAPTER 57.

REHEARING.

SEC.

1160. Correction of Mistakes—Rehearing—Equity Rules 72 and 69.
1161. Allowance of Petition for Rehearing at Same Term at Which Decree Entered Suspends Decree Until Disposition of Petition.
1162. Petition for Rehearing on Newly Discovered Evidence.
1163. Rehearing not Granted Where New Evidence Known When Briefs were Filed.
1164. Granting a Rehearing a Matter of Discretion.

§ 1160. Correction of Mistakes—Rehearing—Equity Rules 72 and 69.

Equity Rule 72. "Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a hearing." (3 U. S. Comp. Stats. 1916, § 1536, p. 2526; Foster's Federal Practice, 5th ed., § 444, p. 1392; Simkins' Federal Equity Suit, 3d ed., p. 585.)

Petition for Rehearing.

Equity Rule 69. "Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the circuit court of appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court." (3 U. S. Comp. Stats. 1916, § 1536, p. 2525.)

§ 1161. Allowance of Petition for Rehearing at Same Term at Which Decree Entered Suspends Decree Until Disposition of Petition. In United States v. Midway Northern Oil Co. (S. D. Cal.), 232 Fed. 619, the court held that while a court is without

power to entertain a petition for rehearing after the term at which final decree was entered, where a petition is filed during the term by leave of court, the decree does not become final until the petition is disposed of.

§ 1162. Petition for Rehearing on Newly Discovered Evidence. In Sheeler v. Alexander, 211 Fed. 544, the court held under Equity Rule 69 that a rehearing in an infringement suit after an interlocutory decree, on the ground of newly discovered evidence, may properly be had upon petition.

To entitle a defendant to a rehearing on the ground of newly discovered evidence it must be shown: (1) That he exercised due and reasonable diligence before the hearing to procure the evidence sought to be introduced; and (2) that the new evidence is material in determining the issues raised by the pleadings and is probably true, and on such questions counter-affidavits may be received.

Day, J., said (pp. 546, 547):

> "While the cases are not fully in accord as to the proper procedure to be followed when an application is made for a rehearing on account of newly discovered evidence, it is apparent from the decisions that if a decree has been entered in the lower courts, and an appeal has been taken therefrom to the Circuit Court of Appeals, so that the Appellate Court has jurisdiction, the proper proceeding is for the petitioner to file a petition duly verified and addressed to the Appellate Court, and praying for leave to file in the lower court a supplemental bill in the nature of a bill of review.
>
> "Inasmuch as rehearings are granted only upon such grounds as would authorize a new trial in an action at law, that is, for newly discovered evidence, or errors of law apparent upon the record, it would seem to be a proper course of procedure in the filing of a petition for a rehearing where only an interlocutory decree has been entered, and there has been no appeal taken to the Circuit Court of Appeals, for the party seeking a rehearing to file its petition with the clerk of the court, and if he relies upon newly discovered evidence, he should set forth this evidence in the bill as far as possible in the petition for rehearing, and, in any event, in affidavits filed with the petition for rehearing and accompanying it. After

filing this petition for a rehearing and the affidavits, he should then obtain an order upon the adverse party to show cause at some later date why his prayer for a rehearing should not be granted. The adverse party may then answer the petition for a rehearing, and upon the petition and answer the application may be heard. If the application for a rehearing is granted, then the petitioning party would be required to file either a supplemental bill or answer, as the case might be, in order that the hearing might be had on the original bill and answer and on the supplemental pleadings."

§ 1163. Rehearing not Granted Where New Evidence Known When Briefs were Filed. In American Hoist & Derrick Co. v. Nancy Hawks Hay Press & Foundry Co. (N. D. Ga.), 224 Fed. 524, the court held that a rehearing in an equity case will not be granted to allow the introduction of new evidence, where such evidence was known at the time the briefs were filed, but no motion was made to suspend or delay the case for the purpose of introducing such evidence.

§ 1164. Granting a Rehearing a Matter of Discretion. In Sheeler v. Alexander (above quoted, § 1162), 211 Fed. 544, at page 545, the court on a petition for rehearing under Equity Rule 69 of an infringement suit on the ground of newly discovered evidence, after referring to Equity Rule 18 abolishing technical forms of pleading, Equity Rule 19 allowing the court to disregard any errors not affecting substantial rights of the parties, Equity Rule 34 permitting supplemental pleadings, and Equity Rule 46 providing for oral testimony in open court at the trial, said:

"It would seem to be the spirit of these new Equity Rules that they were drawn by the Supreme Court with the intent of leaving the judge free to adjust matters in the interests of substantial justice, as he sees fit, unhampered by precedent and by technical definitions and distinctions."

CHAPTER 58.

BILL OF REVIEW.

SEC.
1180. Function of Bill of Review.
1181. Time for Filing—Leave of Court.
1182. Form of Bill of Review.

§ 1180. Function of Bill of Review. A bill of review is to correct errors apparent on the face of the record, and for newly discovered evidence after the term, or for new matter arising since the decree, or for fraud in procuring the decree. If a petition for rehearing can be filed within the term in which the decree was rendered, that would be the proper proceeding, but if it is impossible to reach the matter by petition for rehearing a bill of review may be filed after term.

§ 1181. Time for Filing—Leave of Court. After the end of the term at which a decree is rendered, it becomes an absolute finality and the court has no power to change, revise or grant other relief against it in the cause in which it was rendered, except that it may do so for errors of law, appearing on the face of the decree, which rendered it void.

A bill of review may then be filed in the nature of an original bill, and this without leave of court. (Farmers & Merchants' Bank of Phoenix v. Arizona Mutual Savings & Loan Assn. (9th Cir.), 220 Fed. 1, 135 C. C. A. 577; In re Brown (S. D. N. Y.), 213 Fed. 701.)

A bill of review must be filed within the time allowed for appeal from such decree. (Lewis v. Holmes (7th Cir.), 224 Fed. 410, 140 C. C. A. 8.)

§ 1182. Form of Bill of Review.

[Title of the Case.] [Title of the Court.]

To the District Judge for the —— District of ——.

Petitioner, as plaintiff, vs. [name all other parties in the original suit], as defendants.

Your petitioner shows unto your honors that on the —— day of ——, A. D. 19—, —— herein defendant filed his complaint in the United States District Court for the —— District of ——, against your petitioner, alleging [set out substance of complaint].

That your petitioner appeared and answered said bill on the —— day of ——, A. D. 19—, as follows [setting out substance of answer]; that cause was heard on the —— day of ——, A. D. 19—, and a decree was rendered and recorded in said cause as follows [quote decree].

That said decree is erroneous and it would be inequitable to permit it to stand as entered in this cause because [set out errors complained of].

That no decree should have been rendered, but the bill should have been dismissed.

That because of the error thus apparent your petitioner prays that said decree be reviewed and reversed, and no further proceedings taken thereon, and your petitioner prays that a subpoena be directed to the said —— defendant, commanding him on the —— day of ——, 19—, to show cause why the decree should not be reviewed and reversed.

——, Solicitor.

State of ——,
County of ——,

I, ——, plaintiff in the foregoing petition for review, being duly sworn state that I have read the same and know the contents thereof, and that the matters and things therein alleged are true.

——, Plaintiff.

Sworn to before me this —— day of ——, A. D. 19—.

——, Notary.

CHAPTER 59.

CRIMINAL JURISDICTION.

SEC.

1200. Criminal Jurisdiction of the District Court.
1201. Places Within Which the Criminal Laws of the United States Apply.
1202. Penal Laws Enforced in, and Governing the Federal Courts.
1203. Adoption of State Penal Laws for Reserved Federal Territory Within State Boundaries.
1204. State and Federal Jurisdictions of Offenses.
1205. Jurisdiction of State Courts Under State Laws not Affected.
1206. Venue of Criminal and Penal Prosecutions.
1207. Statutes of Limitations—Criminal Cases.

§ 1200. Criminal Jurisdiction of the District Court.

Par. Second, § 24, Jud. Code. "Of all crimes and offenses cognizable under authority of the United States." (36 Stats. 1091; 4 Fed. Stats. Ann., 2d ed., p. 838; U. S. Comp. Stats. 1916, § 991, par. 2, p. 758.)

Par. Ninth, § 24, Jud. Code. "Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States." (36 Stats. 1092; 4 Fed. Stats. Ann. 2d ed., p. 1048; 1 U. S. Comp. Stats. 1916, § 991 (9), p. 800.)

This jurisdiction is exclusive of the state courts under paragraphs first and second of § 256, Jud. Code. (36 Stats. 1161; 5 Fed. Stats. Ann., p. 921; 2 U. S. Comp. Stats., § 1233, pp. 1841, 1848.)

§ 1201. Places Within Which the Criminal Laws of the United States Apply.

§ 311, Cr. Code. "Except as otherwise expressly provided, the offenses defined in this chapter shall be punished as hereinafter provided, when committed within any territory or district or within or upon any place within the exclusive jurisdiction of the United States." (Fed. Stats. Ann., 2d ed., "Penal Laws"; 10 U. S. Comp. Stats. 1916, § 10,484.)

§ 272, Cr. Code. "The crimes and offenses defined in this chapter shall be punished as herein prescribed:

"First. When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any state, territory, or district thereof.

"Second. When committed upon any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, namely: Lake Superior, Lake Michigan, Lake Huron, Lake Saint Clair, Lake Erie, Lake Ontario, or any of the waters connecting any of said lakes, or upon the River Saint Lawrence where the same constitutes the international boundary line.

"Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

"Fourth. On any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States." (Fed. Stats. Ann., 2d ed., "Penal Laws"; 10 U. S. Comp. Stats. 1916; § 10,445.)

§ *310, Cr. Code.* "The words 'vessel of the United States,' wherever they occur in this chapter, shall be construed to mean a vessel belonging in whole or in part to the United States, or any citizen thereof, or any corporation created by or under the laws of the United States, or of any state, territory, or district thereof." (Fed. Stats. Ann., 2d ed., "Penal Laws"; 10 U. S. Comp. Stats. 1916, § 10,483.)

§ 1202. Penal Laws Enforced in, and Governing the Federal Courts.

§ *722, Rev. Stats.* "The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this title, and of title 'Civil Rights,' and of title

'Crimes,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty." (6 Fed. Stats. Ann., 2d ed., p. 120; 3 U. S. Comp. Stats. 1916, § 1542.)

§ 1203. Adoption of State Penal Laws for Reserved Federal Territory Within State Boundaries.

§ *289, Cr. Code.* "Whoever within the territorial limits of any state, organized territory, or district, but within or upon any of the places now existing or hereafter reserved or acquired, described in section two hundred and seventy-two of this act, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which, if committed or omitted within the jurisdiction of the state, territory, or district in which such place is situated, by the laws thereof now in force, would be penal, shall be deemed guilty of a like offense and be subject to a like punishment; and every such state, territorial, or district law shall, for the purpose of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such state, territory, or district." (Fed. Stats. Ann., 2d ed., "Penal Laws"; 10 U. S. Comp. Stats. 1916, § 10,462.)

§ 1204. State and Federal Jurisdictions of Offenses. Except within reserved territory as set out in the preceding section under § 289, Cr. Code, the federal courts do not execute the penal laws of a state; nor have they any common-law criminal jurisdiction.[1]

[1] United States v. Britton, 108 U. S. 199, 27 **L. Ed.** 698, 2 Sup. Ct. 531; Benson v. McMahon, 127 U. S. 457, 32 **L. Ed.** 234, 8 Sup. Ct. 1240; Jones v.

In criminal cases the law administered is entirely federal, provided and prescribed by Congress under the limitations of the Constitution.[2] The statute adopting state laws as rules of decision does not apply to criminal prosecutions in the federal courts.[3] The laws of evidence in federal criminal trials are those that existed in the states when the judiciary act was adopted in 1789 and as modified by subsequent acts of Congress.[4]

The same act may be an offense against both state and federal laws.[5] But this does not prevent the state court taking jurisdiction of and punishing the act done as an offense against the state; nor a territory from punishing an act also punishable under federal law.[6] So long as the act done is within the punishing power of both state and nation, the fact that the state courts may not take jurisdiction of the crime as denounced by the federal law does not prevent their punishing it under the state law.[7] In a sense there are two distinct crimes involved in such cases;[8] and an acquittal or conviction of one does not bar trial for the other on the ground of former jeopardy.[9]

§ 1205. Jurisdiction of State Courts Under State Laws not Affected.

§ *326, Cr. Code.* "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several

United States, 137 U. S. 202, 34 **L. Ed.** 691, 11 Sup. Ct. 80; United States v. Eaton, 144 U. S. 677, 36 **L. Ed.** 591, 12 Sup. Ct. 764; United States v. Wilson, 3 Blatchf. (N. S.) 435, 438, Fed. Cas. No. 16,731; United States v. Plumer, 3 Cliff. 28, Fed. Cas. No. 16,056.

[2] United States v. Reid, 12 How. (U. S.) 361, 363, 13 **L. Ed.** 1023.

[3] *Ibid.*

[4] *Ibid;* Logan v. United States, 144 U. S. 263, 36 **L. Ed.** 429, 12 Sup. Ct. 617; United States v. Hall, 53 Fed. 353.

[5] United States v. Marigold, 9 How. (U. S.) 569, 13 **L. Ed.** 261; Fox v. Ohio, 5 How. (U. S.) 433, 12 **L. Ed.** 223; Moore v. Illinois, 14 How. (U. S.) 19, 14 **L. Ed.** 306; Ex parte Siebold, 100 U. S. 390, 25 **L. Ed.** 724; United States v. Wells, 28 Fed. Cas. No. 16,665; State v. Kirkpatrick, 32 Ark. 117, 121; People v. Welch, 141 N. Y. 266, 38 **Am. St. Rep.** 793, 24 **L. R. A.** 117, 36 N. E. 328.

[6] Cross v. North Carolina, 132 U. S. 139, 33 **L. Ed.** 290, 10 Sup. Ct. 49; Crossley v. California, 168 U. S. 641, 42 **L. Ed.** 610, 18 Sup. Ct. 242.

[7] Pettibone v. United States, 148 U. S. 197, 37 **L. Ed.** 419, 13 Sup. Ct. 542.

[8] United States v. Barnhart, 22 Fed. 285, 10 Sawy. 491; State v. Oleson, 26 Minn. 507, 5 N. W. 959.

[9] State v. Sly, 4 Or. 277, 279; United States v. Amy, 14 Md. 149, note, 4 Quart. Law J. 163, Fed. Cas. No. 14,445; Carter v. McClaughry, 183 U. S. 365, 46 **L. Ed.** 236, 22 Sup. Ct. 181.

states under the laws thereof." (Fed. Stats. Ann., 2d ed., "Penal Laws"; 10 U. S. Comp. Stats. 1916, § 10,500.)

The making of certain offenses against the laws of the United States punishable does not prevent the states from taking hold of any offenses which may be involved that are contrary to state laws, and not cognizable under the United States laws.[10]

§ 2, *Act February 13, 1913, c. 50.* (Act punishing larceny and asportation of interstate shipments.) "That nothing in this act shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any state shall be a bar to any prosecution hereunder for the same act or acts." (37 Stats. 670; 4 Fed. Stats. Ann., p. 575; 8 U. S. Comp. Stats. 1916, § 8604, p. 9288.)

§ 1206. Venue of Criminal and Penal Prosecutions. This subject is treated in §§ 75, 76, 77, 78 and 79, chapter 4, *supra,* and is only summarized here.

Capital offenses in the county where the offense is committed, where that can be done without great inconvenience (§ 40, Jud. Code).

Offenses on the high seas or elsewhere out of the jurisdiction of a particular state or district, in the district where the offender is found or first brought (§ 41, Jud. Code).

Larceny, etc., of interstate shipments "in any district wherein the crime shall have been committed." Asporting such goods is a separate offense and "prosecutions therefor may be instituted in any district into which such freight, express, baggage, goods, or chattels shall have been removed or into which they shall have been brought by such offender." (Act February 13, 1913, c. 50, 37 Stats. 670, of which § 2 is quoted in § 1205, above.)

Offenses committed in two districts, in either district (§ 42, Jud. Code).

Sale of arms and intoxicants on the Pacific islands deemed committed on high seas or vessel belonging to United States (§ 309, Cr.

[10] Ex parte Houghton, 8 Fed. 897.

Code). Vessel is defined in § 310, Cr. Code, quoted in the last part, § 1201 above.

Pecuniary penalties and forfeitures where they accrue or the offender is found (§ 43, Jud. Code).

Seizures made on high seas for forfeitures, where the property is seized (§ 45, Jud. Code).

Condemnation of insurrectionary property where the same is seized or taken and proceedings first instituted (§ 46, Jud. Code).

Seizures on embargo or insurrection in any district into which the property so seized may be taken and proceedings instituted (§ 47, Jud. Code).

§ 1207. Statutes of Limitations—Criminal Cases. Statutes of limitations is the general subject of chapter 10, *supra*. Limitations as to capital offenses are set out in § 231, *supra;* offenses not capital, §§ 232, 233; under the customs revenue laws, § 239; under internal revenue laws, § 235; seduction of female passenger, § 236; violations of the naturalization laws, § 237.

CHAPTER 60.

GRAND JURY.

SEC.

1220. When Grand Jury Summoned.
1221. Grand Jury to have not Less Than Sixteen nor More Than Twenty-three Members—Talesmen.
1222. Foreman of Grand Jury.
1223. Discharge of Grand Juries.
1224. Grand Jury Indictments by at Least Twelve Jurors.

§ 1220. When Grand Jury Summoned.

§ *284, Jud. Code* (*Re-enacting* § *810, Rev. Stats., as amended Act March 28, 1910*). "No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed orders a venire to issue therefor. If the United States attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing to the district judge, or the senior district judge of the district, that the exigencies of the public service require it, the judge may, in his discretion, also order a venire to issue for a second grand jury. And said court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. But nothing herein shall operate to extend beyond the time permitted by law the imprisonment before indictment found of a person accused of a crime or offense, or the time during which a person so accused may be held under recognizance before indictment found." (36 Stats. 1165; 5 Fed. Stats. Ann. 2d ed., p. 1075; 2 U. S. Comp. Stats. 1916, § 1261; Foster's Federal Practice, 5th ed., p. 1695.)

§ 1221. Grand Jury to have not Less Than Sixteen nor More Than Twenty-three Members—Talesmen.

§ *282, Jud. Code* (*Re-enacting* § *808, Rev. Stats.*). "Every grand jury impaneled before any district court shall consist of not less than sixteen nor more than twenty-three persons.

If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose." (36 Stats. 1165; 5 Fed. Stats. Ann., 2d ed., p. 1074; 2 U. S. Comp. Stats. 1916, § 1259; Foster's Federal Practice, 5th ed., p. 1698.)

§ 1222. Foreman of Grand Jury.

§ *283, Jud. Code* (*Re-enacting* § *809, Rev. Stats.*). "From the persons summoned and accepted as grand jurors, the court shall appoint the foreman, who shall have power to administer oaths and affirmations to witnesses appearing before the grand jury." (36 Stats. 1165; 5 Fed. Stats. Ann., 2d ed., p. 1075; 2 U. S. Comp. Stats. 1916, § 1260.)

§ 1223. Discharge of Grand Juries.

§ *285, Jud. Code* (*Re-enacting* § *811, Rev. Stats.*). "The district courts, the district courts of the territories, and the supreme court of the District of Columbia may discharge their grand juries whenever they deem a continuance of the sessions of such juries unnecessary." (36 Stats. 1166; 5 Fed. Stats. Ann., 2d ed., p. 1077; 2 U. S. Comp. Stats. 1916, § 1262; Foster's Federal Practice, 5th ed., p. 1695.)

§ 1224. Grand Jury Indictments by at Least Twelve Jurors.

§ *1021, Rev. Stats.* "No indictment shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors." (2 Fed. Stats. Ann., 2d ed., p. 675; 3 U. S. Comp. Stats. 1916, § 1685.)

CHAPTER 61.

INDICTMENTS.

SEC.

1240. Form of Indictment for Perjury.
1241. Form of Indictment for Subornation of Perjury.
1242. Form of Indictment Before a Navy Court-martial.
1243. Joining Charges Against a Person in One Indictment—Consolidation of Indictments.
1244. Defects of Form in Indictment—Immaterial Unless Prejudicial.
1245. Judgment *Respondeat Ouster* on Demurrer to an Indictment.

§ 1240. Form of Indictment for Perjury.

§ *5396, Rev. Stats.* "In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed." (Fed. Stats. Ann., 2d ed., "Perjury"; 3 U. S. Comp. Stats. 1916, § 1687.)

§ 1241. Form of Indictment for Subornation of Perjury.

§ *5397, Rev. Stats.* "In every presentment or indictment for subornation of perjury it shall be sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, and without setting forth the commission or authority of the court or person before whom the perjury was committed, or was agreed or promised to be committed." (Fed. Stats. Ann., 2d ed., "Perjury"; 3 U. S. Comp. Stats. 1916, § 1688.)

§ 1242. Form of Indictment Before a Navy Court-martial.

§ *1023, Rev. Stats.* "In prosecutions for perjury committed on examination before a naval general court-martial, or for the subornation thereof, it shall be sufficient to set forth the offense charged on the defendant, without setting forth the authority by which the court was held, or the particular matters brought before, or intended to be brought before, said court." (Fed. Stats. Ann., 2d ed., "Perjury"; 3 U. S. Comp. Stats. 1916, § 1689.)

§ 1243. Joining Charges Against a Person in One Indictment—Consolidation of Indictments.

§ *1024, Rev. Stats.* "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated." (2 Fed. Stats. Ann., 2d ed., p. 676; 3 U. S. Comp. Stats. 1916, § 1690.)

§ 1244. Defects of Form in Indictment—Immaterial Unless Prejudicial.

§ *1025, Rev. Stats.* "No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." (2 Fed. Stats. Ann., 2d ed., p. 681; 3 U. S. Comp. Stats. 1916, § 1691.)

§ 1245. Judgment Respondeat Ouster on Demurrer to an Indictment.

§ *1026, Rev. Stats.* "In every case in any court of the United States, where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be *respondeat ouster;* and thereupon a trial may be ordered at the same term, or a continuance may be ordered, as justice may require." (2 Fed. Stats. Ann., 2d ed., p. 687; 3 U. S. Comp. Stats. 1916, § 1692.)

CHAPTER 62.

ARREST AND BAIL—CIVIL AND CRIMINAL.

SEC.

1260. Arrest—Imprisonment — Bail — Removal for Trial—Offenders Against the United States.
1261. Marshal Making Arrest to Take Prisoner to Nearest Judicial Officer and Return Before Such Officer the Warrant With Certified Copy of Complaint Attached.
1262. Officers Authorized to Hold to Security of the Peace and for Good Behavior.
1263. Bail Admitted in Cases not Capital.
1264. Bail Admitted in Capital Cases Only by Court or Judge.
1265. Bail in Criminal Cases Removed by Writ of Error from State Court.
1266. Bail—Surrender of.
1267. New Bail as Better Security.
1268. Recognizance—Remittance of—Forfeiture of.
1269. Copy of Writ—Jailer's Authority and Original Returned With Officer's Return.
1270. Writ for Removal of Prisoner from One District to Another.
1271. One Writ Sufficient Where Several Indictments Against Same Person.
1272. No Writ Necessary to Bring into Court Person in Custody.
1273. Special Bail in Suits for Duties or Penalties in States Where Imprisonment for Debt not Abolished.
1274. Committing Defendant Who has Given Bail in Another District.
1275. Same—Holding Defendant Until Final Judgment in First Suit.
1276. Calling Bail in Kentucky.
1277. Bail *de Bene Esse* by Clerks in Absence of Judges.

§ 1260. Arrest — Imprisonment — Bail — Removal for Trial —Offenders Against the United States.

§ *1014, Rev. Stats.* "For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United

States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had." (2 Fed. Stats. Ann., 2d ed., p. 654; 3 U. S. Comp. Stats. 1916, § 1674.)

§ 1261. Marshal Making Arrest to Take Prisoner to Nearest Judicial Officer and Return Before Such Officer the Warrant with Certified Copy of Complaint Attached.

Act Aug. 18, 1894, c. 301. "*Provided,* That it shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest circuit court commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof." (2 Fed. Stats. Ann., 2d ed., p. 674; 3 U. S. Comp. Stats. 1916, § 1678.)

§ 1262. Officers Authorized to Hold to Security of the Peace and for Good Behavior.

§ *270, Jud. Code* (*Drawn from* § *727, Rev. Stats.*). "The judges of the Supreme Court and of the circuit court of appeals and district courts, United States commissioners, and the judges and other magistrates of the several states who are or may be authorized by law to make arrests for offenses against the United States, shall have the like authority to hold to security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States, as may

be lawfully exercised by any judge or justice of the peace of the respective states, in cases cognizable before them." (36 Stats. 1163; 5 Fed. Stats. Ann., 2d ed., p. 1056; 2 U. S. Comp. Stats. 1916, § 1247.)

Bail and affidavits in civil cases may be taken by a court commissioner under § 945, Rev. Stats.; 4 Fed. Stats. Ann., p. 772; 3 U. S. Comp. Stats. 1916, § 1571.

§ 1263. Bail Admitted in Cases not Capital.

§ *1015, Rev. Stats.* "Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section [§ 1260, *supra*], to arrest and imprison offenders." (1 Fed. Stats. Ann., 2d ed., p. 490; 3 U. S. Comp. Stats. 1916, § 1679.)

§ 1264. Bail Admitted in Capital Cases Only by Court or Judge.

§ *1016, Rev. Stats.* "Bail may be admitted upon all arrests in criminal cases where the punishment may be death; but in such cases it shall be taken only by the Supreme Court or a circuit court, or by a justice of the Supreme Court, a circuit judge, or a judge of a district court, who shall exercise their discretion therein, having regard to the nature and circumstance of the offense, and of the evidence, and to the usages of law." (1 Fed. Stats. Ann., 2d ed., pp. 490, 491; 3 U. S. Comp. Stats. 1916, § 1680.)

§ 1265. Bail in Criminal Cases Removed by Writ of Error from State Court.

§ *1017, Rev. Stats.* "When a writ of error is issued for the revision of the judgment of a state court, in any criminal proceeding where is drawn in question the validity of a statute of, or an authority exercised under, the United States, or where any title, right, privilege, or immunity is claimed under the Constitution, or any statute of, or commission held or authority exercised under, the United States, the defendant, if charged with an offense that is bailable by the laws of such state, shall not be released from custody until a final judgment upon such

writ, or until a bond, with sufficient sureties, in a reasonable sum, as ordered and approved by the state court, is given; and if the offense is not so bailable, until a final judgment upon the writ of error." (1 Fed. Stats. Ann., 2d ed., p. 491; 3 U. S. Comp. Stats. 1916, § 1681.)

§ 1266. Bail—Surrender of.

§ *1018, Rev. Stats.* "Any party charged with a criminal offense and admitted to bail may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for such offense; and at the request of such bail, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and exoneretur of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law." (1 Fed. Stats. Ann., 2d ed., p. 491; 3 U. S. Comp. Stats. 1916, § 1682.)

§ 1267. New Bail as Better Security.

§ *1019, Rev. Stats.* "When proof is made to any judge of the United States, or other magistrate having authority to commit on criminal charges as aforesaid, that a person previously admitted to bail on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security; or, for default thereof, cause him to be committed to prison; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued by such judge or magistrate, setting forth the cause thereof." (1 Fed. Stats. Ann., 2d ed., p. 492; 3 U. S. Comp. Stats. 1916, § 1683.)

§ 1268. Recognizance—Remittance of—Forfeiture of.

§ *1020, Rev. Stats.* "When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no wilful default of the party, and that a trial can, notwith-

standing, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced." (1 Fed. Stats. Ann., 2d ed., p. 492; 3 U. S. Comp. Stats. 1916, § 1684.)

§ 1269. Copy of Writ — Jailer's Authority and Original Returned With Officer's Return.

§ *1028, Rev. Stats.* "Whenever a prisoner is committed to a sheriff or jailer by virtue of a writ, warrant, or mittimus, a copy thereof shall be delivered to such sheriff or jailer, as his authority to hold the prisoner, and the original writ, warrant, or mittimus shall be returned to the proper court or officer, with the officer's return thereon." (2 Fed. Stats. Ann., 2d ed., p. 672; 3 U. S. Comp. Stats. 1916, § 1694.)

§ 1270. Writ for Removal of Prisoner from One District to Another.

§ *1029, Rev. Stats.* "Only one writ or warrant is necessary to remove a prisoner from one district to another. One copy thereof may be delivered to the sheriff or jailer from whose custody the prisoner is taken, and another to the sheriff or jailer to whose custody he is committed, and the original writ, with the marshal's return thereon, shall be returned to the clerk of the district to which he is removed." (2 Fed. Stats. Ann., 2d ed., p. 673; 3 U. S. Comp. Stats. 1916, § 1695.)

§ 1271. One Writ Sufficient Where Several Indictments Against Same Person.

§ *1027, Rev. Stats.* "When two or more charges are made, or two or more indictments are found against any person, only one writ or warrant shall be necessary to commit him for trial; and it shall be sufficient to state in the writ the name or general character of the offenses, or to refer to them only in very general terms." (2 Fed. Stats. Ann., 2d ed., p. 672; 3 U. S. Comp. Stats. 1916, § 1693.)

§ 1272. No Writ Necessary to Bring into Court Person in Custody.

§ *1030, Rev. Stats.* "No writ is necessary to bring into court any prisoner or person in custody, or for remanding

him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fees shall be charged by the clerk or marshal." (2 Fed. Stats. Ann., 2d ed., p. 673; 3 U. S. Comp. Stats. 1916, § 1696.)

§ 1273. Special Bail in Suits for Duties or Penalties in States Where Imprisonment for Debt not Abolished.

§ *942, Rev. Stats.* "In all suits or prosecutions for the recovery of duties or pecuniary penalties prescribed by the laws of the United States, commenced in any state where, by the laws thereof, imprisonment for debt shall not have been abolished, the person against whom process is issued shall be held to special bail, subject to the rules which prevail in civil suits in which special bail is required." (1 Fed. Stats. Ann., 2d ed., p. 488; 3 U. S. Comp. Stats. 1916, § 1568.)

§ 1274. Committing Defendant Who has Given Bail in Another District.

§ *943, Rev. Stats.* "When a defendant who has procured bail to respond to the judgment in a suit in any court of the United States in any district is afterward arrested in any other district and is committed to a jail, the use of which had been ceded to the United States for the custody of prisoners, the judge of the court wherein the suit in which the defendant has so procured bail is depending, shall, at the request of the bail, order that such defendant be held in said jail, in the custody of the marshal of the district in which it is. The said marshal, upon the delivery of such order, duly authenticated, shall receive such person into his custody, and thereupon be chargeable for an escape, and shall forthwith make a certificate, under his hand and seal of such commitment, and transmit the same to the court from which the order issued, and, if required, shall make and deliver to such bail or to his attorney a duplicate thereof. Upon the return of said certificate, the court which made the said order, or any judge thereof, may direct that an exoneretur be entered upon the bailpiece, where special bail shall have been found, or otherwise discharge such bail." (1 Fed. Stats. Ann., 2 ed., p. 489; 3 U. S. Comp. Stats. 1916, § 1569.)

§ 1275. Same — Holding Defendant Until Final Judgment in First Suit.

§ *944, Rev. Stats.* "When a defendant is committed by virtue of the order provided in the preceding section, he shall, unless sooner discharged by law, be holden in jail until final judgment is rendered in the suit in which he procured bail as aforesaid, and sixty days thereafter, if such judgment is rendered against him, in order that he may be charged in execution, which may, in such cases, be directed to and served by the marshal in whose custody he is." (1 Fed. Stats. Ann., 2d ed., p. 489; 3 U. S. Comp. Stats. 1916, § 1570.)

§ 1276. Calling Bail in Kentucky.

§ *946, Rev. Stats.* "When a bail bond is given for the appearance of any person to answer in the district or circuit court for the district of Kentucky, the clerk of such court shall call the party at the time he is bound to appear. If the party fails, the clerk shall enter such failure on his minutes, and on said entry judgment may afterward be made of record by the court; but if the party appears, the clerk shall take another bond, with sureties similar to the first, for further appearance at the next succeeding term of the court, and if the party fails to give such other bond and surety, he shall stand committed by order of the clerk until he complies." (1 Fed. Stats. Ann., 2d ed., p. 489; 3 U. S. Comp. Stats. 1916, § 1572.)

§ 1277. Bail de Bene Esse by Clerks in Absence of Judges.

§ *947, Rev. Stats.* "Recognizances of special bail may be taken *de bene esse* by the clerks of the circuit and district courts, in the absence or in case of the disability of the judges, in any action depending in either of the said courts, where special bail is demandable." (1 Fed. Stats. Ann., 2d ed., pp. 489, 490; 3 U. S. Comp. Stats. 1916, § 1573.)

CHAPTER 63.

EXTRADITION.

SEC.

1300. When and by Whom Warrant may Issue for Arrest of Fugitive from Justice from a Foreign Country.
1301. Person Held for Extradition Only on Evidence Establishing Probable Cause.
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1303. Extradition to Foreign Country or Territory Occupied or Under Control of United States of Persons Committing Certain Offenses.
1304. Hearing — Certification of Testimony to Secretary of State — Warrant for Commitment Pending Surrender.
1305. Hearing to be Public on Land.
1306. Witnesses for Indigent Prisoners.
1307. Evidence on the Hearing.
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1310. Time Allowed for Extradition Two Months After Commitment.
1311. Extradition Provisions Continue During Existence of Treaty.
1312. Transportation and Protection of Person Extradited to the United States.
1313. Same—Powers of Agent Receiving Such Persons Extradited from Foreign Country.
1314. Same—Penalty for Opposing Agent or Attempting Rescue.
1315. Interstate Extradition.
1316. Penalty for Resisting Agent or Attempting Rescue, Interstate Extradition.

§ 1300. When and by Whom Warrant may Issue for Arrest of Fugitive from Justice from a Foreign Country.

First Part, § 5270. "Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district, or territory, with having committed within the jurisdiction of any such foreign govern-

ment any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. . . . " (3 Fed. Stats. Ann., 2d ed., p. 265; 10 U. S. Comp. Stats. 1916, § 10,110, p. 12,367.)

§ 1301. Person Held for Extradition Only on Evidence Establishing Probable Cause.

Part § 5270, Rev. Stats. " . . . *Provided, further,* That such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged: . . ." (3 Fed. Stats. Ann., 2d ed., p. 265; 10 U. S. Comp. Stats. 1916, § 10,110, p. 12,368.)

§ 1302. No Extradition for Political Offense.

Part § 5270, Rev. Stats. " . . . *And provided further,* That no return or surrender shall be made of any person charged with the commission of any offense of a political nature. . . ." (3 Fed. Stats. Ann., 2d ed., p. 265; 10 U. S. Comp. Stats. 1916, § 10,110, p. 12,368.)

§ 1303. Extradition to Foreign Country or Territory Occupied or Under Control of United States of Persons Committing Certain Offenses.

Part § 5270, Rev. Stats. " . . . *Provided,* That whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein, by the commission of any of the following offenses, namely: Murder and assault with intent to commit murder; counterfeiting or altering money, or uttering or bringing into circulation counterfeit or altered money; counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same; forgery or altering and uttering what is forged or altered; embezzlement or criminal malversation of the public funds, committed by public officers, em-

ployees, or depositaries; larceny or embezzlement of an amount not less than one hundred dollars in value; robbery; burglary, defined to be the breaking and entering by night time into the house of another person with intent to commit a felony therein; and the act of breaking and entering the house or building of another, whether in the day or night time, with the intent to commit a felony therein; the act of entering, or of breaking and entering, the offices of the government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein; perjury or the subornation of perjury; rape, arson; piracy by the law of nations; murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory, and not under the flag of the United States or of some other government; malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human life, and who shall depart or flee, or who has departed or fled, from justice therein to the United States, any territory thereof or to the District of Columbia,—shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered, as hereinafter provided, to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title, so far as applicable, shall govern proceedings authorized by this proviso: . . ." (3 Fed. Stats. Ann., 2d ed., p. 266; 10 U. S. Comp. Stats. 1916, § 10,110, p. 12,367.)

§ 1304. Hearing—Certification of Testimony to Secretary of State—Warrant for Commitment Pending Surrender.

Part § 5270, Rev. Stats. " . . . If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon

the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made. . . ." (3 Fed. Stats. Ann., 2d ed., p. 265; 10 U. S. Comp. Stats. 1916, § 10,110, p. 12,367.)

§ 1305. Hearing to be Public on Land.

§ *1, Act Aug. 3, 1882, c. 378.* "That all hearings in cases of extradition under treaty stipulation or convention shall be held on land, publicly, and in a room or office easily accessible to the public." (22 Stats. 215; 3 Fed. Stats. Ann., 2d ed., p. 312; 10 U. S. Comp. Stats. 1916, § 10,112, p. 12,396.)

§ 1306. Witnesses for Indigent Prisoners.

§ *3, Act Aug. 3, 1882, c. 378.* "That on the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged, setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpoenaed; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpoenaed in behalf of the United States." (3 Fed. Stats. Ann., 2d ed., p. 312; 10 U. S. Comp. Stats. 1916, § 10,114; Charlton v. Kelly, 229 U. S. 447, 37 **L. Ed.** 1274, 46 **L. R. A. (N. S.)** 397, 33 Sup. Ct. 945.)

§ 1307. Evidence on the Hearing.

§§ *5 and 6, Act Aug. 3, 1882, c. 378.* "Sec. 5 (Evidence on hearing). That in all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under title sixty-six of the Revised Statutes of the United States, such depositions, warrants, and other papers, or the copies thereof, shall be re-

ceived and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant, or other paper or copies thereof, so offered, are authenticated in the manner required by this act." (3 Fed. Stats. Ann., 2d ed., p. 313; 10 U. S. Comp. Stats. 1916, § 10,116; Ex parte Schorer, 197 Fed. 67; Ex parte La Mantia, 206 Fed. 330.)

"Sec. 6. (Repeal.) The act approved June nineteenth, eighteen hundred and seventy-six, entitled, 'An Act to Amend Section fifty-two hundred and seventy-one of the Revised Statutes of the United States,' and so much of said section fifty-two hundred and seventy-one of the Revised Statutes of the United States as is inconsistent with the provisions of this act are hereby repealed." (22 Stats. 215; 3 Fed. Stats. Ann., 2d ed., p. 315.)

§ *5271, Rev. Stats.* "(Evidence on the hearing.) In every case of complaint, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any foreign country may have been granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended, if they are authenticated in such manner as would entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party escaped. The certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any paper or other document so offered is authenticated in the manner required by this section." (3 Fed. Stats. Ann., 2d ed., p. 281; 10 U. S. Comp. Stats. 1916, § 10,111.)

§ 1308. Surrender of Person by Secretary of State for a Fair and Impartial Trial.

Last Part § 5270, Rev. Stats. " . . . If so held such person shall be returned and surrendered to the authorities in con-

trol of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such a person a fair and impartial trial." (3 Fed. Stats. Ann., 2d ed., p. 265; 10 U. S. Comp. Stats. 1916, § 10,110, p. 12,368.)

First Part § 5272, Rev. Stats. "It shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person so authorized to hold such person in custody, and to take him to the territory of such foreign government, pursuant to such treaty. . . ." (3 Fed. Stats. Ann., 2d ed., p. 282; 10 U. S. Comp. Stats. 1916, § 10,118.)

§ 1309. Retaking of Escaped Person Held for Extradition.

Last Part § 5272, Rev. Stats. " . . . If the person so accused shall escape out of any custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape, may be retaken on an escape." (3 Fed. Stats. Ann., 2d ed., p. 282; 10 U. S. Comp. Stats. 1916, § 10,118.)

§ 1310. Time Allowed for Extradition Two Months After Commitment.

§ *5273, Rev. Stats.* "Whenever any person who is committed under this title or any treaty, to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, it shall be lawful for any judge of the United States, or of any state, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been

given to the Secretary of State, to order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered." (3 Fed. Stats. Ann., 2d ed., p. 283; 10 U. S. Comp. Stats. 1916, § 10,119.)

§ 1311. Extradition Provisions Continue During Existence of Treaty.

§ *5274, Rev. Stats.* "The provisions of this title relating to the surrender of persons who have committed crimes in foreign countries shall continue in force during the existence of any treaty of extradition with any foreign government, and no longer." (3 Fed. Stats. Ann., 2d ed., p. 283; 10 U. S. Comp. Stats. 1916, § 10,120.)

§ 1312. Transportation and Protection of Person Extradited to the United States.

§ *5275, Rev. Stats.* "Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused." (3 Fed. Stats. Ann., 2d ed., p. 283; 10 U. S. Comp. Stats. 1916, § 10,121.)

§ 1313. Same—Powers of Agent Receiving Such Persons Extradited from Foreign Country.

§ *5276, Rev. Stats.* "Any person duly appointed as agent to receive, in behalf of the United States, the delivery, by a foreign government, of any person accused of crime committed within the jurisdiction of the United States, and to convey him

to the place of his trial, shall have all the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping." (3 Fed. Stats. Ann., 2d ed., p. 284; 10 U. S. Comp. Stats. 1916, § 10,122.)

§ 1314. Same—Penalty for Opposing Agent or Attempting Rescue.

§ *5277, Rev. Stats.* "Every person who knowingly and willfully obstructs, resists, or opposes such agent in the execution of his duties, or who rescues or attempts to rescue such prisoner, whether in the custody of the agent or of any officer or person to whom his custody has lawfully been committed, shall be punishable by a fine of not more than one thousand dollars, and by imprisonment for not more than one year." (3 Fed. Stats. Ann., 2d ed., p. 284; 10 U. S. Comp. Stats. 1916, § 10,123.)

§ 1315. Interstate Extradition.

§ *5278, Rev. Stats.* "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such

demand shall be paid by such state or territory." (3 Fed. Stats. Ann., 2d ed., p. 285; 10 U. S. Comp. Stats. 1916, § 10,126.)

§ 1316. Penalty for Resisting Agent or Attempting Rescue, Interstate Extradition.

§ *5279, Rev. Stats.* "Any agent so appointed who receives the fugitive into his custody shall be empowered to transport him to the state or territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars or imprisoned not more than one year." (3 Fed. Stats. Ann., 2d ed., p. 311; 10 U. S. Comp. Stats. 1916, § 10,127.)

CHAPTER 64.

HABEAS CORPUS.

SEC.

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§ 1330. Constitutional Provision.

Clause 2, § 9, Art. 1, U. S. Const. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." (10 U. S. Comp. Stats. 1916, p. 13,531.)

§ 1331. Courts Authorized to Issue Writ of Habeas Corpus.

§ *262, Jud. Code* (*Superseding* § *751, Rev. Stats.*). " . . . The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." (36 Stats. 1162; 5 Fed. Stats. Ann., 2d ed., p. 928; 2 U. S. Comp. Stats. 1916, § 1239; Foster's Federal Practice, 5th ed., pp. 8, 1469, 1527, 2413; Simkins' Federal Equity Suit, 3d ed., p. 41.)

The character of the restraint or imprisonment suffered by a party applying for the writ of *habeas corpus* must be actual con-

finement or the present means of enforcing it. Something more than moral restraint is necessary to make a case.[1] Jurisdiction of a writ of *habeas corpus* does not depend upon the question whether there has been a formal commitment or not.[2] Arrest under a civil process is not a case for remedy by *habeas corpus*.[3] In order to obtain the benefit of this writ and to procure its being issued by the court or justice or judge who has a right to order its issue, it should be made to appear, upon the application for the writ, that it is founded upon some matter which justifies the exercise of federal authority, and which is necessary to the enforcement of rights under the Constitution, laws, or treaties of the United States.[4] The supreme court has authority to issue the writ of *habeas corpus*, but except in cases affecting ambassadors, other public ministers, or consuls, and those in which a state is a party, it can only be done for a review of the judicial decision of some inferior officer or court.[5] The courts of the United States will not discharge the prisoner by *habeas corpus* in advance of a final determination of his case in the courts of the state; and even after such final determination in those courts will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from the supreme court.[6] When a person has been discharged upon *habeas corpus* the issues of law and fact involved are *res judicata*, and the person so discharged cannot, for the same cause, be again lawfully arrested.[7]

1 Wales v. Whitney, 114 U. S. 564, 29 **L. Ed.** 277, 5 Sup. Ct. 1050.

2 Matter of McDonald, 9 Am. Law Reg. 661, 16 Fed. Cas. No. 8751.

3 Ex parte Wilson, 6 Cranch, 52, 3 **L. Ed.** 149. See also In re Mineau, 45 Fed. 188.

4 In re Burrus, 136 U. S. 586, 34 **L. Ed.** 1500, 10 Sup. Ct. 850.

5 Ex parte Hung Hang, 108 U. S. 552, 27 **L. Ed.** 811, 2 Sup. Ct. 863; In re Lane, 135 U. S. 443, 34 **L. Ed.** 219, 10 Sup. Ct. 760; Ex parte Terry, 128 U. S. 289, 32 **L. Ed.** 405, 9 Sup. Ct. 77; Ex parte Parks, 93 U. S. 18, 23 **L. Ed.** 787; Ex parte Siebold, 100 U. S. 375, 25 **L. Ed.** 718.

6 Whitten v. Tomlinson, 160 U. S. 231, 40 **L. Ed.** 406, 16 Sup. Ct. 297; Baker v. Grice, 169 U. S. 284, 42 **L. Ed.** 748, 18 Sup. Ct. 323; Kohl v. Lehlback, 160 U. S. 293, 40 **L. Ed.** 432, 16 Sup. Ct. 304; In re Frederich, 149 U. S. 70, 37 **L. Ed.** 653, 13 Sup. Ct. 793.

7 United States v. Chung Shee, 71 Fed. 277. But see In re White, 45 Fed. 237; Ex parte Kaine, 3 Blatchf. 1, Fed. Cas. No. 7597.

§ 1332. Power of Judges to Grant Writs of Habeas Corpus.

§ *752, Rev. Stats.* "The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty." (3 Fed. Stats. Ann., 2d ed., p. 448; 2 U. S. Comp. Stats. 1916, § 1280.)

The clause, "cause of restraint of liberty," will allow writs of *habeas corpus* to stand, and at common law they do stand, for all unlawful restraints, whether under color of process, or through the illegal acts of individuals, or under a commitment to an insane asylum.[8]

§ 1333. Cases Where Federal Writ of Habeas Corpus will Issue.

§ *753, Rev. Stats.* "The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify." (3 Fed. Stats. Ann., 2d ed., p. 449; 2 U. S. Comp. Stats. 1916, § 1281.)

In all cases where federal officers, civil or military, have the custody and control of a person claimed to be unlawfully restrained of liberty, such person is restrained of liberty under color of authority of the United States, and the federal courts can proceed to determine the question of unlawful restraint, because no other court can properly do so.[9]

[8] King v. McLean Asylum, 64 Fed. 331, 26 L. R. A. 784, 12 C. C. A. 145.

[9] United States v. Crook, 5 Dill. 453, Fed. Cas. No. 14,891; Matter of McDonald, 9 Am. Law. Reg. 661, 16 Fed. Cas. No. 8751; Matter of Keeler, Hempst. 306, Fed. Cas. No. 7637.

§ 1334. Application for Writ of Habeas Corpus—How Made.

§ *754, Rev. Stats.* "Application for writ of *habeas corpus* shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application." (3 Fed. Stats. Ann., 2d ed., p. 462; 2 U. S. Comp. Stats. 1916, § 1282.)

It is not enough, in order to require the court to issue a writ of *habeas corpus,* that the petition alleges that the prisoner is held in violation of the Constitution of the United States, or of a treaty with a foreign nation. That is a mere formal allegation, covering conclusions of law as well as of fact, and the petition must present specific allegations raising an issue.[10]

Facts duly alleged may be taken to be true, unless denied by the return or controlled by other evidence. But no allegation of fact in the petition can be assumed to be admitted unless distinct and unambiguous.[11]

§ 1335. Allowance and Direction of Writ of Habeas Corpus.

§ *755, Rev. Stats.* "The court, or justice, or judge to whom such application is made shall forthwith award a writ of *habeas corpus,* unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained." (3 Fed. Stats. Ann., 2d ed., p. 464; 2 U. S. Comp. Stats. 1916, § 1283.)

It is not a question, at the time of the application for the writ, whether or not the facts alleged in the petition are true or false. They are to be verified by the oath of the petitioner, and if he sets out in his petition what is necessary to give a federal court juris-

[10] In re Storti, 109 Fed. 807; King v. McLean Asylum, 64 Fed. 325, 12 C. C. A. 139.

[11] Whitten v. Tomlinson, 160 U. S. 231, 40 L. Ed. 406, 16 Sup. Ct. 297; Kohl v. Lehlback, 160 U. S. 293, 40 L. Ed. 432, 16 Sup. Ct. 304.

diction, the writ must issue, and the truth or falsity of the facts alleged must be determined at the hearing.[12]

§ 1336. Time of Return of Writ of Habeas Corpus.

§ *756, Rev. Stats.* "Any person to whom such writ is directed shall make due return thereof within three days thereafter unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days." (3 Fed. Stats. Ann., 2d ed., p. 467; 2 U. S. Comp. Stats. 1916, § 1284.)

A reasonable time has always been allowed for making the return, and it is not to be presumed that one will not be made.[13]

§ 1337. Form of Return of Writ of Habeas Corpus.

§ *757, Rev. Stats.* "The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party." (14 Stats. 385; 3 Fed. Stats. Ann., 2d ed., p. 468; 2 U. S. Comp. Stats. 1916, § 1285.)

A return should be signed by the person to whom the writ is directed or should be accompanied by an explanation why that is not done.[14]

§ 1338. Producing the Person.

§ *758, Rev. Stats.* "The person making the return shall at the same time bring the body of the party before the judge who granted the writ." (3 Fed. Stats. Ann., 2d ed., p. 468; 2 U. S. Comp. Stats. 1916, § 1286.)

§ 1339. The Day for Hearing.

§ *759, Rev. Stats.* "When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days

12 Electoral College's Case, 1 Hughes, 571, Fed. Cas. No. 4336; In re Greenwald, 77 Fed. 590.

13 Ex parte Baez, 177 U. S. 378, 44 L. Ed. 813, 20 Sup. Ct. 673.

14 Seavey v. Seymour, 3 Cliff. 439, Fed. Cas. No. 12,596.

thereafter, unless the party petitioning requests a longer time." (3 Fed. Stats. Ann., 2d ed., p. 469; 2 U. S. Comp. Stats. 1916, § 1287.)

§ 1340. Denial of Return—Counter Allegations—Amendments.

§ *760, Rev. Stats.* "The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained." (14 Stats. 835; 3 Fed. Stats. Ann., 2d ed., p. 469; 2 U. S. Comp. Stats. 1916, § 1288.)

The averments of the answer to the return will be taken as denied by the respondent, as no further pleading is required by the statute.[15]

§ 1341. Summary Hearing—Disposition of Party.

§ *761, Rev. Stats.* "The court or justice or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." (14 Stats. 385; 3 Fed. Stats. Ann., 2d ed., p. 469; 2 U. S. Comp. Stats. 1916, § 1289.)

This section means that if he is held in custody in violation of the Constitution or a law of the United States, or for an act done or omitted in pursuance of a law of the United States, he must be discharged.[16] Where a person is held on process on a final judgment, after conviction on a trial on an indictment, and a *habeas corpus* is issued, and the return to the writ states the process as the cause of detention, the "facts" the court is required to determine, either on such return alone or by the aid of a *certiorari*, are the final judgment, the conviction, the fact of trial, and the indictment. The particulars of the evidence which led to the con-

[15] Matter of Leary, 10 Ben. 197, Fed. Cas. No. 8162.

[16] In re Neagle, 135 U. S. 1, 34 L. Ed. 55, 10 Sup. Ct. 658; In re Anderson, 94 Fed. 487.

viction are no part of such "facts."[17] In proceedings upon *habeas corpus* the authority of the courts is not so restricted as to compel them in every instance either to discharge the prisoner absolutely or to remand him to the custody of the person producing him, but the provision empowering and requiring the court to "dispose of the party as law and justice require," authorizes the court to commit the custody of the party to anyone showing a right thereto.[18] The injunction to hear the case summarily, and thereupon dispose of the party as law and justice may require, does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.[19]

§ 1342. In Cases Involving the Law of Nations—Notice to be Served on State Attorney General.

§ *762, Rev. Stats.* "When a writ of *habeas corpus* is issued in the case of any prisoner who, being a subject or citizen of a foreign state and domiciled therein, is committed or confined or in custody by or under the authority or law of any one of the United States, or process founded thereon, on account of any act done or omitted under an alleged right, title, authority, privilege, protection, or exemption, claimed under the commission or order or sanction of any foreign state or under color thereof, the validity and effect whereof depend upon the law of nations, notice of the said proceeding, to be prescribed by the court or justice or judge at the time of granting said writ, shall be served on the attorney general or other officer prosecuting the pleas of said state and due proof of such service shall be made to the court, or justice, or judge before the hearing." (5 Stats. 539; 3 Fed. Stats. Ann., 2d ed., p. 474; 2 U. S. Comp. Stats. 1916, § 1290.)

[17] In re Stupp, 12 Blatchf. 501, Fed. Cas. No. 13,563.

[18] Motherwell v. United States, 107 Fed. 437, 48 C. C. A. 97; Medley, Petitioner, 134 U. S. 160, 33 L. Ed. 835, 10 Sup. Ct. 384.

[19] Ex parte Royall, 117 U. S. 254, 29 L. Ed. 872, 6 Sup. Ct. 742; State of Minnesota v. Brundage, 180 U. S. 499, 45 L. Ed. 639, 21 Sup. Ct. 455.

CHAPTER 65.

ARRAIGNMENT AND TRIAL.

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§ 1360. How Offenses are Prosecuted.

Capital Offenses or Otherwise Infamous Crimes.

Part 5th Amend. U. S. Const. "No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . . " (11 U. S. Comp. Stats. 1916, p. 14,320.)

Offenses not Infamous.

§ *1022, Rev. Stats.* "All crimes and offenses committed against the provisions of chapter seven, Title 'Crimes,' which are not infamous, may be prosecuted either by indictment or by information filed by a district attorney." (2 Fed. Stats. Ann., 2d ed., p. 675; 3 U. S. Comp. Stats. 1916, § 1686.)

Under § 1021, Rev. Stats. (§ 1224 above), no indictment shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors.

§ 1361. Duty of District Attorney to Prosecute.

Part § 771, Rev. Stats. "It shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States. . . . " (4 Fed. Stats. Ann., 2d ed., p. 756; 2 U. S. Comp. Stats. 1916, § 1296; Foster's Federal Practice, 5th ed., p. 1615.)

§ 1362. Standing Mute—Plea not Guilty.

§ 1032, Rev. Stats. "When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury." (2 Fed. Stats. Ann., 2d ed., pp. 687, 688; 3 U. S. Comp. Stats. 1916, § 1698.)

§ 1363. Persons Indicted of Treason or Capital Offense Entitled to Copy of Indictment and List of Jurors and Witnesses.

§ 1033, Rev. Stats. "When any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial." (2 Fed. Stats. Ann., 2d ed., p. 688; 3 U. S. Comp. Stats. 1916, § 1699.)

This provision is not directory only, but mandatory to the government; and its purpose is to inform the defendant of the testimony he will have to meet and enable him to prepare his defense. Being enacted for his benefit, he may doubtless waive it, if he pleases; but he has a right to insist upon it, and if he seasonably does so, the trial cannot lawfully proceed until the requirement has been

complied with.[1] There would appear to be a negative pregnant here, and it has accordingly been held that in cases not capital the prisoner is not entitled to a copy of the indictment at government expense.[2] Nor is he entitled to a list of witnesses and jurors.[3] But in cases not capital, where there has been no preliminary examination, it is within the discretion of the court to order a list of the witnesses sworn before the grand jury to be furnished the accused.[4] The arraignment is to be regarded as the commencement of the trial, and the statutory time in which the copy of the indictment and a list of the jury are to be delivered to him must be exclusive of the day of delivery and the day of arraignment.[5]

§ 1364. Persons Indicted for Capital Crimes Entitled to Counsel and to Compel Witnesses.

§ *1034, Rev. Stats.* "Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two as he may desire, and they shall have free access to him at all seasonable hours. He shall be allowed, in his defense, to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution." (1 Stats. 118; 2 Fed. Stats. Ann., 2d ed., p. 690; 3 U. S. Comp. Stats. 1916, § 1700.)

Part 6th Amend. U. S. Const. "In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of

1 Logan v. United States, 144 U. S. 263, 36 L. Ed. 429, 12 Sup. Ct. 617; Hickory v. United States, 151 U. S. 303, 38 L. Ed. 170, 14 Sup. Ct. 334; United States v. Cornell, 2 Mason, 91, Fed. Cas. No. 14,868.

2 United States v. Van Duzee, 140 U. S. 169, 35 L. Ed. 399, 11 Sup. Ct. 758; Shelp v. United States, 81 Fed. 694, 26 C. C. A. 570.

3 United States v. Van Duzee, 140 U. S. 169, 35 L. Ed. 399, 11 Sup. Ct. 758.

4 United States v. Southmayd, 6 Biss. 321, Fed. Cas. 16,361.

5 United States v. Dow, Taney, 34, Fed. Cas. No. 14,990.

Counsel for his defense." (11 U. S. Comp. Stats. 1916, p. 14,388.)

§ 1365. Accused has Right to Trial by Jury.

Part 6th Amend. U. S. Const. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, . . . " (11 U. S. Comp. Stats. 1916, p. 14,388.)

The provisions relating to qualifications and exemptions, etc., of petit jurors are about the same as for grand jurors set out in chapter 60 above; but in prosecutions for bigamy or polygamy there are special grounds of challenge set out in the following section. The subject of petit juries is treated in §§ 583–593 inclusive, *supra*. Special provisions as to challenges in criminal cases are in the following sections.

§ 1366. Peremptory Challenges—Criminal Cases.

§ *287, Jud. Code.* "When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers." (36 Stats. 1166; 5 Fed. Stats. Ann., 2d ed., p. 1078; 2 U. S. Comp. Stats. 1916, § 1264.)

§ 1367. Excessive Peremptory Challenges in Capital Cases Disregarded.

§ *1031, Rev. Stats.* "If, in the trial of a capital offense, the party indicted peremptorily challenges jurors above the

number allowed him by law, such excess of challenges shall be disallowed by the court, and the cause shall proceed for trial in the same manner as if they had not been made." (6 Fed. Stats. Ann., 2d ed., p. 139; 3 U. S. Comp. Stats. 1916, § 1697; Foster's Federal Practice, 5th ed., p. 1690.)

§ 1368. Challenges in Prosecutions for Bigamy or Polygamy.

§ *288, Jud. Code* (*Re-enacting* § *5, Act March 22, 1882, c. 47*). "In any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman—

"First, that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offense punishable either by sections one or three of an Act entitled, 'An Act to Amend Section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in Reference to Bigamy, and for Other Purposes,' approved March twenty-second, eighteen hundred and eighty-two, or by section fifty-three hundred and fifty-two of the Revised Statutes of the United States, or the act of July first, eighteen hundred and sixty-two, entitled, 'An Act to Punish and Prevent the Practice of Polygamy in the Territories of the United States and Other Places, and Disapproving and Annulling Certain Acts of the Legislative Assembly of the Territory of Utah'; or

"Second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman.

"Any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge; and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court.

"But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offense

above named; but if he declines to answer on any ground, he shall be rejected as incompetent." (36 Stats. 1166; 5 Fed. Stats. Ann., 2d ed., p. 1081; 2 U. S. Comp. Stats. 1916, § 1265.)

§ 1369. Trial of Criminal Cases. Provisions as to evidence are in chapter 11, and as to witnesses in chapter 12.

The federal courts follow their own rules and decisions respecting the trial of criminal cases and matters incidental thereto.

The rules of the district court in the various districts should be consulted.

CHAPTER 66.

VERDICT AND JUDGMENT IN CRIMINAL CASES.

SEC.
1380. Verdict for Less Offense Than Charged.
1381. Verdict Against One or More Several Joint Defendants.
1382. Qualified Verdict in Cases of Murder in First Degree or Rape.
1383. Execution Postponed in Capital Case Carried to Appellate Court.
1384. Judgments for Fines—How Collected.
1385. Discharge of Indigent Convicts Imprisoned for Fines.
1386. Confinement in State Jail or Penitentiary When Use of so Allowed by State Law.
1387. Where No Penitentiary or Jail Suitable or Available Attorney General may Designate in a Convenient State or Territory—Transportation of Prisoners—Change of Place to Preserve Health or Custody of Prisoner or Because of His Improper or Cruel Treatment.
1388. Transportation of Criminals to Places of Imprisonment by Marshal.
1389. Confinement of Juvenile Offenders Under Sixteen in House of Refuge.
1390. Confinement of Juvenile Offenders Under Twenty Separate from Prisoners Over Twenty.

§ 1380. Verdict for Less Offense Than Charged.

§ *1035, Rev. Stats.* "In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged; *Provided,* That such attempt be itself a separate offense." (7 Stats. 198; 2 Fed. Stats. Ann., 2d ed., p. 690; 3 U. S. Comp. Stats. 1916, § 1701.)

This section does not authorize a jury to find the defendant guilty of a less offense than the one charged, unless the evidence justified them in so doing. Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial.[1]

§ 1381. Verdict Against One or More Several Joint Defendants.

§ *1036, Rev. Stats.* "On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render

[1] Sparf v. United States, 156 U. S. 51, 715, 39 L. Ed. 343, 15 Sup. Ct. 273.

a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury." (2 Fed. Stats. Ann., 2d ed., p. 692; 3 U. S. Comp. Stats. 1916, § 1702.)

§ 1382. Qualified Verdict in Cases of Murder in First Degree or Rape.

§ *330, Cr. Code.* "In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life." (Fed. Stats. Ann., 2d ed., "Penal Laws"; 10 U. S. Comp. Stats. 1916, § 10,504.)

§ 1383. Execution Postponed in Capital Case Carried to Appellate Court.

§ *6, Act Feb. 6, 1889, c. 113.* [*Writs of error on conviction of crimes punishable by death.*] "That hereafter in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be re-examined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe. Every such writ of error shall be allowed as of right and without the requirement of any security for the prosecution of the same or for costs. Upon the allowance of every such writ of error, it shall be the duty of the clerk of the court to which the writ of error shall be directed to forthwith transmit to the Clerk of the Supreme Court of the United States a certified transcript of the record in such case, and it shall be the duty of the Clerk of the Supreme Court of the United States to receive, file, and docket the same. Every such writ of error shall during its pendency operate as a stay of proceedings upon the judgment in respect of which it is sued out. Any such writ of error may be filed and docketed in said Supreme Court at any time in a term held prior to

the term named in the citation as well as at the term so named; and all such writs of error shall be advanced to a speedy hearing on motion of either party. When any such judgment shall be either reversed or affirmed the cause shall be remanded to the court from whence it came for further proceedings in accordance with the decision of the Supreme Court, and the court to which such cause is so remanded shall have power to cause such judgment of the Supreme Court to be carried into execution. No such writ of error shall be sued out or granted unless a petition therefor shall be filed with the clerk of the court in which the trial shall have been had during the same term or within such time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record." (25 Stats. 656; 6 Fed. Stats. Ann., 2d ed., p. 146; 3 U. S. Comp. Stats. 1916, § 1703, p. 3561.)

Section 238, Jud. Code, providing for appeals and writs of error from the district courts to the supreme court, does not contain the clause, contained in the former law, giving appellate review in criminal cases. Section 128, Jud. Code, now vests such criminal appellate jurisdiction in the circuit court of appeals.

§ 1384. Judgments for Fines—How Collected.

§ *1041, Rev. Stats.* "In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced: *Provided,* That where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid." (3 Fed. Stats. Ann., 2d ed., p. 327; 3 U. S. Comp. Stats. 1916, § 1705.)

§ 1385. Discharge of Indigent Convicts Imprisoned for Fines.

§ *1042, Rev. Stats.* "When a poor convict, sentenced by any court of the United States to pay a fine, or fine and cost,

whether with or without imprisonment, has been confined in prison thirty days, solely for the nonpayment of such fine, or fine and cost, he may make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter; and if on examination it shall appear to him that such convict is unable to pay such fine, or fine and cost, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: 'I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil precept for debt by the laws of [state where oath is administered]; and that I have no property in any way conveyed or concealed, or, in any way disposed of, for my future use or benefit. So help me God.' And thereupon such convict shall be discharged, the commissioner giving to the jailer or keeper of the jail a certificate setting forth the facts." (3 Fed. Stats. Ann., 2d ed., p. 328; 3 U. S. Comp. Stats. 1916, § 1706.)

§ *5296, Rev. Stats.* "When a poor convict, sentenced by any court of the United States to be imprisoned and pay a fine, or fine and cost, or to pay a fine, or fine and costs, has been confined in prison thirty days, solely for the nonpayment of such fine, or fine and costs, such convict may make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and costs, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter. If on examination it shall appear to him that such convict is unable to pay such fine, or fine and costs, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: 'I do solemnly swear that I have not any property, real or personal,

to the amount of twenty dollars, except such as is by law exempt from being taken on civil process for debt by the laws of [naming the state where oath is administered], and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God. Upon taking such oath, such convict shall be discharged; and the commissioner shall give to the keeper of the jail a certificate setting forth the facts." (3 Fed. Stats. Ann., 2d ed., p. 338; 10 U. S. Comp. Stats. 1916, § 10,138.)

§ 1386. Confinement in State Jail or Penitentiary When Use of so Allowed by State Law.

§ *5542, Rev. Stats.* "In every case where any criminal convicted of any offense against the United States is sentenced to imprisonment and confinement to hard labor, it shall be lawful for the court by which the sentence is passed to order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose." (Fed. Stats. Ann., 2d ed., "Prisons and Prisoners"; 10 U. S. Comp. Stats. 1916, § 10,528.)

§ 1387. Where No Penitentiary or Jail Suitable or Available, Attorney General may Designate in a Convenient State or Territory—Transportation of Prisoners—Change of Place to Preserve Health or Custody of Prisoner or Because of His Improper or Cruel Treatment.

§ *5546, Rev. Stats.* "All persons who have been, or who may hereafter be, convicted of crime by any court of the United States, including consular courts, whose punishment is imprisonment in a district or territory or country where, at the time of conviction or at any time during the term of imprisonments, there may be no penitentiary or jail suitable for the confinement of convicts, or available therefor, shall be confined during the term for which they have been or may be sentenced, or during the residue of said term, in some suitable jail or penitentiary in a convenient state or territory, to be designated by the Attorney General, and shall be transported and delivered to the warden or keeper of such jail or peni-

tentiary by the marshal of the district or territory where the conviction has occurred; and in case of convictions by a consular court the transportation shall be by some properly qualified agent or agents designated by the Department of State, the reasonable actual expense of transportation, necessary subsistence, and hire and transportation of guards and agent or agents to be defrayed from the appropriation for bringing home criminals; and if the conviction be had in the District of Columbia, the transportation and delivery shall be by the warden of the jail of that District, the reasonable actual expense of transportation, necessary subsistence, and hire and transportation of guards and the marshal, or the warden of the jail in the District of Columbia only, to be paid by the Attorney General out of the judiciary fund. But if, in the opinion of the Attorney General, the expense of transportation from any state, territory, or the District of Columbia in which there is no penitentiary will exceed the cost of maintaining them in jail in the state, territory, or the District of Columbia during the period of their sentence, then it shall be lawful so to confine them therein for the period designated in their respective sentences. And the place of imprisonment may be changed in any case when, in the opinion of the Attorney General, it is necessary for the preservation of the health of the prisoner, or when, in his opinion, the place of confinement is not sufficient to secure the custody of the prisoner, or because of cruel and improper treatment: *Provided, however,* That no change shall be made in the case of any prisoner on the ground of the unhealthiness of the prisoner or because of his treatment, after his conviction and during his term of imprisonment, unless such change shall be applied for by such prisoner, or some one in his behalf." (31 Stats. 1450; Fed. Stats. Ann., 2d ed., "Prisons and Prisoners"; 10 U. S. Comp. Stats. 1916, § 10,547.)

§ 1388. Transportation of Criminals to Places of Imprisonment by Marshal.

§ 5, *Act March 3, 1891, c. 529.* "That the transportation of all United States prisoners convicted of crimes against the laws of the United States in any state, district, or territory, and sentenced to terms of imprisonment in a penitentiary, and their delivery to the superintendent, warden, or keeper of such

United States prisons, shall be by the marshal of the district or territory where such conviction may occur, after the erection and completion of said prisons. That the actual expenses of such marshal, including transportation and subsistence, hire, transportation, and subsistence of guards, and the transportation and subsistence of the convict or convicts, be paid, on the approval of the Attorney General, out of the judiciary fund." (26 Stats. 839; Fed. Stats. Ann., 2d ed., "Prisons and Prisoners"; 10 U. S. Comp. Stats. 1916, § 10,556.)

§ 1389. Confinement of Juvenile Offenders Under Sixteen in House of Refuge.

§ 7, *Act March 3, 1891, c. 529.* "That this act shall not apply to minors who, in the judgment of the judges presiding over United States courts, should be committed to reformatory institutions. *And provided,* That nothing in this act shall be construed as prohibiting the courts of the United States from sentencing to or confining prisoners, either civil or military, in the United States military prison at Fort Leavenworth, Kansas." (26 Stats. 840; Fed. Stats. Ann., 2d ed., "Prisons and Prisoners"; 10 U. S. Comp. Stats. 1916, § 10,558.)

§ *5549, Rev. Stats.* "Juvenile offenders against the laws of the United States, being under the age of sixteen years, and who may hereafter be convicted of crime, the punishment whereof is imprisonment, shall be confined during the term of sentence in some house of refuge to be designated by the Attorney General, and shall be transported and delivered to the warden or keeper of such house of refuge by the marshal of the district where such conviction has occurred; or if such conviction be had in the District of Columbia, then the transportation and delivery shall be by the warden of the jail of that district, and the reasonable actual expense of the transportation, necessary subsistence, and hire, and transportation of assistants and the marshal or warden, only, shall be paid by the Attorney General, out of the judiciary fund." (17 Stats. 35; Fed. Stats. Ann., 2d ed., "Prisons and Prisoners"; 10 U. S. Comp. Stats. 1916, § 10,550.)

§ 1390. Confinement of Juvenile Offenders Under Twenty Separate from Prisoners Over Twenty.

§ 9, *Act March 3, 1891, c. 529.* "That the Attorney General shall be authorized to designate to which of said prisons persons convicted in such states or territories shall be carried for confinement: *Provided,* That in the construction of the prison buildings provided for in this act there shall be such arrangement of cells and yard space as that prisoners under twenty years of age shall not be in any way associated with prisoners above that age, and the management of the class under twenty years of age shall be as far as possible reformatory." (26 Stats. 840; Fed. Stats. Ann., 2d ed., "Prisons and Prisoners"; 10 U. S. Comp. Stats. 1916, § 10,560.)

CHAPTER 67.

PARDON AND PAROLE.

SEC.

1400. Mitigation or Remission of Fine, etc., by Secretary of Treasury upon Summary Investigation by District Judge.
1401. Same—Rules and Mode of Proceeding may be Prescribed by Secretary of Treasury.
1402. Same—Penalty of Imprisonment or Removal from Office Excepted—Preservation of Informer's Right to Share of Fine, etc.
1403. Execution of Death Penalty.
1404. No Corruption of Blood or Forfeiture of Estate.
1405. Whipping and Pillory Abolished.
1406. Pardoning Power of the President.
1407. Parole of Prisoners.

§ 1400. Mitigation or Remission of Fine, etc., by Secretary of Treasury upon Summary Investigation by District Judge.

§ *5292, Rev. Stats.* "Whenever any person who shall have incurred any fine, penalty, or forfeiture, or disability, or may be interested in any vessel or merchandise which has become subject to any seizure, forfeiture, or disability by authority of any provisions of law for imposing or collecting any duties or taxes, or relating to registering, recording, enrolling, or licensing vessels, and for regulating the same, or providing for the suppression of insurrections or unlawful combinations against the United States, shall prefer his petition to the judge of the district in which such fine, penalty, or forfeiture, or disability has accrued, truly and particularly setting forth the circumstances of his case, and shall pray that the same may be mitigated or remitted, the judge shall inquire, in a summary manner, into the circumstances of the case; first causing reasonable notice to be given to the person claiming such fine, penalty, or forfeiture, and to the attorney of the United States for such district, that each may have an opportunity of showing cause against the mitigation or remission thereof; and shall cause the facts appearing upon such inquiry to be stated and annexed to the petition, and direct their transmission to the Secretary of the Treasury. The Secretary shall

thereupon have power to mitigate or remit such fine, forfeiture, or penalty, or remove such disability, or any part thereof, if, in his opinion, the same was incurred without wilful negligence, or any intention of fraud in the person incurring the same; and to direct the prosecution, if any has been instituted for the recovery thereof, to cease and be discontinued, upon such terms or conditions as he may deem reasonable and just." (3 Fed. Stats. Ann., 2d ed., p. 332; 10 U. S. Comp. Stats. 1916, § 10,130.)

§ 1401. Same—Rules and Mode of Proceeding may be Prescribed by Secretary of Treasury.

§ *5293, Rev. Stats.* "The Secretary of the Treasury is authorized to prescribe such rules and modes of proceeding to ascertain the facts upon which an application for remission of a fine, penalty, or forfeiture is founded, as he deems proper, and, upon ascertaining them, to remit the fine, penalty, or forfeiture, if in his opinion it was incurred without wilful negligence or fraud, in either of the following cases:

"First. If the fine, penalty, or forfeiture was imposed under authority of any revenue law, and the amount does not exceed one thousand dollars.

"Second. Where the case occurred within either of the collection districts in the states of California or Oregon.

"Third. If the fine, penalty, or forfeiture was imposed under authority of any provisions of law relating to the importation of merchandise from foreign contiguous territory, or relating to manifests for vessels enrolled or licensed to carry on the coasting trade on the northern, northeastern, and northwestern frontiers.

"Fourth. [By amendment transferred to 'First,' leaving this blank.]

"Fifth. If the fine, penalty, or forfeiture was imposed by authority of any provisions of law for levying or collecting any duties or taxes, or relating to registering, recording, enrolling, or licensing vessels, and the case arose within the collection district of Alaska, or was imposed by virtue of any provisions of law relating to fur seals upon the islands of Saint Paul and Saint George." (3 Fed. Stats. Ann., 2d ed., p. 335; 10 U. S. Comp. Stats. 1916, § 10,131.)

§ 1402. Same—Penalty of Imprisonment or Removal from Office Excepted—Preservation of Informer's Right to Share of Fine, etc.

§ *5294, Rev. Stats.* "The Secretary of the Treasury may, upon application therefor, remit or mitigate any fine, penalty, or forfeiture provided for in laws relating to vessels, or discontinue any prosecution to recover penalties or relating to forfeitures denounced in such laws, excepting the penalty of imprisonment or of removal from office, upon such terms as he, in his discretion, shall think proper; and all rights granted to informers by such laws shall be held subject to the Secretary's powers of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a court of competent jurisdiction prior to the application for the remission of the penalty or forfeiture; and the Secretary shall have authority to ascertain the facts upon all such applications in such manner and under such regulations as he may deem proper." (3 Fed. Stats. Ann., 2d ed., p. 336; 10 U. S. Comp. Stats. 1916, § 10,135.)

§ 1403. Execution of Death Penalty.

§ *323, Crim. Code* (*Superseding without change* § *5325, Rev. Stats.*). ("The manner of inflicting the punishment by death shall be by hanging." (Fed. Stats. Ann., 2d ed., "Penal Laws"; 10 U. S. Comp. Stats. 1916, § 10,497.)

§ 1404. No Corruption of Blood or Forfeiture of Estate.

§ *324, Crim. Code* (*Superseding* § *5326, Rev. Stats.*). "No conviction shall work corruption of blood or forfeiture of estate." (Fed. Stats. Ann., 2d ed., "Penal Laws"; 10 U. S. Comp. Stats. 1916, § 10,498.)

§ 1405. Whipping and Pillory Abolished.

§ *325, Crim. Code* (*Old* § *5327, Rev. Stats.*). "The punishment of whipping and of standing in the pillory shall not be inflicted." (Fed. Stats. Ann., 2d ed., "Penal Laws"; 10 U. S. Comp. Stats. 1916, §10,499.)

§ 1406. Pardoning Power of the President.

§ *327, Crim. Code* (*Old* § *5330, Rev. Stats.*). "Whenever, by the judgment of any court or judicial officer of the United States, in any criminal proceeding, any person is sentenced to two kinds of punishment, the one pecuniary and the other corporal, the president shall have full discretionary power to pardon or remit, in whole or in part, either one of the two kinds, without in any manner impairing the legal validity of the other kind, or any portion of either kind, not pardoned or remitted." (Fed. Stats. Ann., 2d ed., "Penal Laws"; 10 U. S. Comp. Stats. 1916, § 10,501.)

§ 1407. Parole of Prisoners.

Act January 23, 1913, c. 9. "That every prisoner who has been or may hereafter be convicted of any offense against the United States and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, or for the term of his natural life, whose record of conduct shows that he has observed the rules of such institution, and who, if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced, or, if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole as hereinafter provided." (37 Stats. 650; Fed. Stats. Ann., 2d ed., "Prisons and Prisoners"; 10 U. S. Comp. Stats. 1916, § 10,535.)

CHAPTER 68.

COURT OF CLAIMS.

SEC.
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§ 1430. Organization. The Court of Claims consists of a chief justice and four judges appointed by the President. § 136, Jud. Code (Appendix, *post*).

A seal is provided under § 137, Jud. Code (Appendix, *post*).

§ 139, Jud. Code (Appendix, *post*), provides for other officers appointed by the Court; a chief clerk, assistant clerk, bailiff and chief messenger.

Their salaries are provided for in § 140, Jud. Code (Appendix, *post*).

The bond of assistant clerk is provided for in § 141, Jud. Code (Appendix, *post*).

Whoever has been elected a senator, member of or delegate to Congress, or resident commissioner is disqualified during his term of office to practice in the Court of Claims, § 144, Jud. Code (Appendix, *post*).

§ 142, Jud. Code (Appendix, *post*), provides for the settling of accounts of Court of Claims by its clerk, under proper bond.

§ 1431. Sessions. The Court of Claims shall hold one annual session at the city of Washington, beginning the first Monday

in December, any three judges of said court constituting a quorum. The concurrence of three judges is necessary for a decision. § 138, Jud. Code (Appendix, *post*).

§ 1432. Jurisdiction. The Court of Claims shall have jurisdiction to hear and determine all claims (except for pensions), founded upon the Constitution of the United States, or any law of Congress, or on any regulation of an executive department, upon any contract with the government of the United States in cases not sounding in tort; excepting all Civil War claims. Also all setoffs, counterclaims, claims for damages, or other demands whatsoever on the part of the government of the United States, against any claimant against the government in said court; excepting an action for recovery of fees, due for services performed by an officer of the United States, until account of said fees shall have been rendered and acted upon as required by law. Also any claim of a paymaster, quartermaster, or other disbursing officer of the United States for loss of goods by capture. § 145, Jud. Code (Appendix, *post*).

The jurisdiction of said court shall not extend to any claim, not pending therein on December 1, 1862, growing out of any treaty with foreign nations or Indian tribes. § 153, Jud. Code (Appendix, *post*).

An act conferring jurisdiction in the Court of Claims to hear, determine and render judgment in claims of the Sisseton and Walepton bands of Sioux Indians against the United States. Right of appeal is given to either party to the Supreme Court of the United States. 39 Stats., 47, c. 63.

No person shall file and prosecute in the Court of Claims or in the Supreme Court on appeal therefrom any claim against a person claiming authority from the United States government when such claim is pending elsewhere. § 154, Jud. Code (Appendix, *post*).

Any alien whose government allows citizens of the United States to prosecute claims against said government in its courts

shall be accorded the same privilege in the United States Court of Claims, provided the court has jurisdiction over the subject matter. § 155, Jud. Code (Appendix, *post*).

The Court of Claims shall have jurisdiction to hear and determine all claims for proceeds of abandoned property and to adjudge said claims. § 162, Jud. Code (Appendix, *post*).

The Court of Claims has jurisdiction to take over claims transmitted to it by any other executive department and to decide all controverted questions of fact and law, provided, however, it has been transmitted with the consent of the claimant, and report its findings to the department. § 148, Jud. Code (Appendix, *post*).

All claims transmitted to Court of Claims by head of departments shall be proceeded in as other claims pending in the Court of Claims and subject to the same rules and regulations. § 149, Jud. Code (Appendix, *post*).

Whenever any bill is pending in either house of Congress providing for payment of a claim against the United States, said bill may be referred to Court of Claims for investigation of facts and a report is to be made to the house concerning said bill, provided the court has jurisdiction over subject-matter of the bill. § 151, Jud. Code (Appendix, *post*).

§ 180, Jud. Code (Appendix, *post*), provides for the settlement and adjustment by the Court of Claims of debts due to the United States.

§ 5261, Rev. Stats. (10 U. S. Comp. Stats. 1916, § 10,068, p. 12,322), provides for the right of any railway company to bring suit in the Court of Claims on bonds issued to said company, the interest on which has not been paid.

Every owner of a patent may bring suit to recover in the Court of Claims for the unlicensed use of said patent by the United States. (Act June 25, 1910, c. 423; 9 U. S. Comp. Stats. 1916, § 9465, p. 10,457.)

§ 1433. Statute of Limitations. Every claim cognizable by the Court of Claims shall be forever barred unless filed as provided by law within six years after said claim accrues, excepting in a case of married women, infants and idiots, lunatics, and insane persons, and persons beyond the seas, and in this case within three years after disability has ceased. § 156, Jud. Code (Appendix, *post*).

§ 1434. Rules of Practice. § 157, Jud. Code (Appendix, *post*), provides for powers of the court to establish its rules of government and practice.

The claimant in all cases must set forth fully his claim in his petition, the action of Congress or any department upon the same, and persons interested therein. When and upon what consideration said persons became interested, that there is no assignment or transfer of interest on said Claim except as is stated in the petition. That said claimant is justly entitled to the amount claimed from the United States, after allowing all just credits and offsets. That the claimant, if a citizen, has at all times borne true allegiance to the government of the United States and whether a citizen or not, has in no way aided or abetted or given encouragement to a rebellion against the United States, the petition shall be verified by the said claimant, his attorney or agent. § 159, Jud. Code (Appendix, *post*).

The judges and clerks of said court may administer oaths and affirmations and take acknowledgments of instruments in writing and give certificates of the same. § 158, Jud. Code (Appendix, *post*).

As to whether a person aided or not the rebellion, known as the Civil War, is a jurisdictional fact to be considered before allowing the claim; in the case of a claim against the United States for stores furnished the army or navy. § 184, Jud. Code (Appendix, *post*).

The Attorney General or his assistants under his direction shall appear for the defense and protection of the interests of the

United States in all cases which may be transmitted to the Court of Claims. § 185, Jud. Code (Appendix, *post*).

No claims shall be allowed by the accounting officers or the Court of Claims wherein the claimant claims more than is justly due; and does this with the intent to defraud the United States. § 173, Jud. Code (Appendix, *post*).

In cases where the claimant corruptly practices or attempts to practice fraud against the United States in representing his claim, the claimant shall "*ipso facto*" forfeit his claim forever, and this is a bar to further prosecution of the same. § 172, Jud. Code (Appendix, *post*).

When the facts set out in petition appear in the mind of the court insufficient for grounds of relief, the court shall not authorize the taking of any testimony. § 165, Jud. Code (Appendix, *post*).

§ 160, Jud. Code (Appendix, *post*), provides for traverse by the government in allegations as to true allegiance and not aiding or abetting any rebellion against the United States. And also if said issues are decided against the claimant, said petition shall be dismissed.

The burden of proof is on the claimant in all actions regarding the loyalty or disloyalty of individuals during the Civil War. § 161, Jud. Code (Appendix, *post*).

The method of taking testimony to be used before the Court of Claims is by commission. The Court of Claims shall have the right to appoint commissioners to take testimony and also gives power to prescribe the fees they are to receive. § 163, Jud. Code (Appendix, *post*).

§ 167, Jud. Code (Appendix, *post*), provides that the testimony in cases pending in the Court of Claims shall be taken in the county in which the witness resides, when the same can be done conveniently.

§ 168, Jud. Code (Appendix, *post*), provides for the issuing of subpoenas by the Court of Claims.

The commissioner taking testimony shall administer an oath to the witness brought before him for examination. § 170, Jud. Code (Appendix, *post*).

§ 166, Jud. Code (Appendix, *post*), provides for the examination of the claimant by the government.

The court may and shall have power to call on any of the departments for information or papers it deems necessary in the prosecution of its business, but the head of any department may, when such compliance would be injurious to public interests, refuse to comply with the Court's demand. § 164, Jud. Code (Appendix, *post*).

§ 1435. Witnesses. No person shall be excluded as a witness for the Court of Claims on account of their color or because they are interested in the cause or proceeding and any plaintiff may be examined in behalf of the government. § 186, Jud. Code (Appendix, *post*).

Opportunity of cross-examination shall be allowed both the United States and the claimant. § 169, Jud. Code (Appendix, *post*).

§ 1436. New Trials. When there are sufficient grounds for the same, the court may grant the claimant a new trial. § 174, Jud. Code (Appendix, *post*).

Upon motion of the United States the court may grant a new trial upon such evidence as may satisfy the Court that fraud, wrong or injustice in the premises has been done the United States. § 175, Jud. Code (Appendix, *post*).

§ 1437. Settling of Accounts—Interest. Upon deciding that a disbursing officer has a loss in his account without his fault, the court shall make a decree setting forth the amount thereof, and upon such a decree the proper accounting officers of the treasury shall allow to said officer the amount so decreed as a credit in the settlement of his accounts. § 147, Jud. Code (Appendix, *post*).

No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by court of claims, unless upon a contract expressly stipulating for the payment of interest. § 177, Jud. Code (Appendix, *post*).

§ 1438. Costs. When testimony is taken by commissioner for the claimant, the costs of the same are to be paid by the claimant. If taken on behalf of the government, the contingent fund provided for the Court of Claims pays for the same unless there is special appropriation by Congress for the purpose. § 171, Jud. Code (Appendix, *post*).

§ 152, Jud. Code (Appendix, *post*), provides for the allowing of costs to the prevailing party.

§ 176, Jud. Code (Appendix, *post*), provides for payment of costs by the closing party for the printing of the record in each case.

§ 1439. Judgments and Their Effects. Any final judgment by the Court of Claims against the claimant shall be a bar to further action on said claim. § 179, Jud. Code (Appendix, *post*).

The payment of the amount due on any judgment of the Court of Claims shall be a full discharge to the United States of all claim and demand. § 178, Jud. Code (Appendix, *post*).

The presentation of a judgment fully signed as provided by law to the Secretary of the Treasury shall entitle the claimant therein to full payment of his claim. (§ 1089, Rev. Stats.; 6 U. S. Comp. Stats. 1916, § 6405, p. 7456.)

§ 143, Jud. Code (Appendix, *post*), provides for the report of judgments of the Court of Claims to Congress on the first day of every regular session of Congress. Also at the ending of the term of court the clerk shall transmit copies of decisions to the heads of departments; the solicitor, the comptroller, auditors of the treasury, commissioner of general land office and of Indian affairs, chiefs of bureaus, and to other officers charged with ad-

justment of claims against the United States. The purpose of these reports is to furnish guides in like cases.

The Attorney General shall report to Congress, at the beginning of each regular session, the suits under section 180, Jud. Code (Appendix, *post*), in which a final judgment or decree has been rendered, giving date and statement of costs in each case. § 183, Jud. Code (Appendix, *post*).

The payment on claims referred from departments and decided by the Court of Claims in favor of the claimant shall be made out of any specific appropriation applicable to the case, and where no appropriation exists it shall be paid in same manner as any other decree of said court. § 150, Jud. Code (Appendix, *post*).

Reports of the Court of Claims to Congress under § 148 and § 151, Jud. Code (Appendix, *post*), if not acted upon during session at which they were reported, shall be continued from session to session and Congress to Congress until finally acted upon. § 187, Jud. Code (Appendix, *post*).

All judgments in favor of the government, on setoffs or counterclaims, shall be enforced the same as any other judgment of said court would be enforced. § 146, Jud. Code (Appendix, *post*).

§ 1440. Appeals. The United States or the claimant shall have the right to appeal as provided and restricted according to law. § 181, Jud. Code (Appendix, *post*).

In Indian cases the United States or the tribe of Indians, or other party in interest, shall have the right of appeal as prescribed and provided for by law. § 182, Jud. Code (Appendix, *post*).

CHAPTER 69.

COURT OF CUSTOMS APPEALS.

SEC.
1450. In General.
1451. General Appraisers—Board of.
1452. Court of Customs Appeals—Organization.
1453. Sessions.
1454. Jurisdiction.
1455. Time for Appeal from Board of General Appraisers.
1456. Calendar.

§ 1450. In General. The court of customs appeals was established in 1909 to have appellate jurisdiction over matters decided by the board of general appraisers. This jurisdiction was exercised prior to 1909 by the circuit courts of the United States. An appeal lay to the circuit court of appeals and from there to the Supreme Court of the United States in cases provided. The court of customs appeals has superseded the jurisdiction of the circuit courts in these matters, and its judgment is final.

§ 1451. General Appraisers—Board of. There are nine general appraisers of merchandise, appointed by the President, by and with the consent of the Senate. They are employed at such ports as are designated by the Secretary of the Treasury. It is the duty of a general appraiser to revise and correct the reports of the assistant appraisers. He also must reappraise any merchandise when the collector deems the appraisement too low, or when the importer, owner, agent, or consignee of the merchandise is dissatisfied with the appraisement. The decision of the appraiser, unless objection is made to it, is final and conclusive as to the dutiable value of such merchandise against all parties interested therein.

The board of general appraisers consists of three of the general appraisers, which are on duty at the port of New York. If the

decision of the general appraiser as to the dutiable value of the merchandise is unsatisfactory to the importer, owner, consignee, or agent, or to the collector, and notice is given to the collector within two days after the decision of the general appraiser, the collector must transmit the invoice and all the papers appertaining thereto, to the board of general appraisers, at New York, or to a board of three general appraisers, at that port or any other port designated by the Secretary of the Treasury, who shall examine the case thus submitted, and decide it.

The general appraisers are judicial officers of the Treasury Department, and their duty is confined to examining the case submitted to them, and the single question involved is the dutiable value of the merchandise.

The general board of nine general appraisers establishes the rules of each of the three general boards.[1] By the act of October 3, 1913, c. 16, last part, III, N., 38 Stats. at L. 187 (6 U. S. Comp. Stats. 1916, § 5595, p. 6714), the determination of the board of general appraisers as to payment of duties shall be final "except in cases where an appeal shall be filed in the United States court of customs appeals within the time and manner provided by law." (Louisiana v. McAdoo, 234 U. S. 627, 58 **L. Ed.** 1506, 34 Sup. Ct. 938.)

§ 1452. Court of Customs Appeals—Organization. § 194, Jud. Code (Appendix, *post*), provides for the organization and general powers of the court of customs appeals.

§ 188, Jud. Code (Appendix, *post*), provides that there shall be a United States court of customs appeals and that the same shall consist of a presiding judge and four associate judges; each appointed by the President with the consent and advice of the Senate. Any three members shall constitute a quorum and a concurrence of three members shall be necessary for a decision.

[1] Act of June 10, 1890, 26 Stats. 136, pars. 12, 14, 15, amended July 24, 1897, amended May 27, 1908, 35 Stats. 403, 21 Op. Atty-Gen. 85; United States v. Loeb, 107 Fed. 692, 46 C. C. A. 562; 23 Op. Atty-Gen. 377; In re Muser, 49 Fed. 831; United States v. Newhall, 91 Fed. 525, 34 C. C. A. 690; United States v. Beebe, 103 Fed. 785; 117 Fed. 670.

§ 191, Jud. Code (Appendix, *post*), relates to the clerk of the court of customs appeals; states his duties, compensation, residence, powers and the fees he may charge for his services.

§ 192, Jud. Code (Appendix, *post*), sets out the fact that the court may appoint an assistant clerk and stenographic clerks, and states what their compensation shall be. Also states that a stenographic reporter may be appointed and what his compensation may be.

§ 190, Jud. Code (Appendix, *post*), provides that a marshal may be appointed and what his duties and powers are to be. Also states what he is allowed for compensation.

§ 193, Jud. Code (Appendix, *post*), provides that the marshal of said court is to provide suitable rooms and furnishings for said court. Also provides for the appointment of bailiffs and messengers of court and their compensation.

§ 1453. Sessions. § 189, Jud. Code (Appendix, *post*), sets out the time when said court is to be in session, and what compensation a judge is to receive when traveling and how the expenses of said judge are to be paid.

§ 1454. Jurisdiction. § 195, Jud. Code, as amended Act Aug. 22, 1914, c. 267 (Appendix, *post*), provides that the court of customs appeals has exclusive appellate jurisdiction to review by appeal the final decisions of the general board of appraisers in all cases as to the construing of the law and all issues of fact. It sets out the decisions reviewable in the court of customs appeals.

§ 196, Jud. Code (Appendix, *post*), provides that all appeals on customs subject-matter are to be taken to the United States court of customs appeals.

§ 197, Jud. Code (Appendix, *post*), provides for certification of cases pending in other courts to the court of customs appeals.

§ 1455. Time for Appeal from Board of General Appraisers. § 198, Jud. Code (Appendix, *post*), provides for appeal from decisions of appraisers and states such appeal shall be made within sixty days after entry of decree or judgment.

§ 1456. Calendar. § 199, Jud. Code (Appendix, *post*), provides for a court calendar and the calling of the same every sixty days, but not during the months of July and August.

CHAPTER 70.

CIRCUIT COURT OF APPEALS.

SEC.
1470. Judicial Circuits.
1471. Organization, Judges, Marshals, Clerks and Deputies.
1472. Terms.
1473. Rules of Procedure.
1474. Admission to Practice.
1475. Reports of Decisions.

§ 1470. Judicial Circuits. There are nine judicial circuits of the United States provided for in chapter 6 of the Judicial Code (Appendix, *post*).

§ 116, Jud. Code (Appendix, *post*), sets out the districts included in the various circuits. First: Rhode Island, Massachusetts, New Hampshire and Maine, to which by Act of Jan. 28, 1915, c. 22, Porto Rico was added. Second: Vermont, Connecticut, and New York. Third: Pennsylvania, New Jersey and Delaware. Fourth: Maryland, Virginia, West Virginia, North Carolina and South Carolina. Fifth: Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas. Sixth: Ohio, Michigan, Kentucky and Tennessee. Seventh: Indiana, Illinois, and Wisconsin. Eighth: Nebraska, Minnesota, Iowa, Missouri, Kansas, Arkansas, Colorado, Wyoming, North Dakota, South Dakota, Utah, Oklahoma, and New Mexico. Ninth: California, Oregon, Washington, Nevada, Idaho, Montana, Arizona, and Hawaii.

§ 1471. Organization, Judges, Marshals, Clerks and Deputies. § 117, Jud. Code (Appendix, *post*), provides that in each circuit there be a circuit court of appeals, consisting of three judges, any two forming a quorum. It is a court of record with appellate jurisdiction as limited and established in said chapter 6, Jud. Code.

§ 118, Jud. Code (Appendix, *post*), sets out how the circuit judges are appointed, the number of circuit judges in the various

circuits, the compensation received by them, their places of residence, and certain of their duties.

§ 121, Jud. Code (Appendix, *post*), states how and the manner in which the terms "circuit justices" and "justices of a circuit" are to be used in this title.

§ 119, Jud. Code (Appendix, *post*), sets out in what manner and how the allotments of various circuit court judges are made and the reasons for said allotment.

§ 120, Jud. Code (Appendix, *post*), states the duties of chief justice of the Supreme Court and his associate justice, when in attendance of any session of the circuit court of appeals. It also provides for district judges sitting on the circuit court of appeals, and that a judge who sat in the court below is disqualified above.

A judge who sat at the hearing below of a whole cause at any stage thereof is undoubtedly disqualified to sit in the circuit court of appeals at the hearing of the whole cause at the same or at any later stage. (Moran v. Dillingham, 174 U. S. 153, 43 **L. Ed.** 930, 19 Sup. Ct. 620.) A decree in which a disqualified judge took part will be quashed and set aside without regard to the merits. (Ibid.; American Constr. Co. v. Jacksonville etc. R. Co., 148 U. S. 372, 37 **L. Ed.** 486, 13 Sup. Ct. 758.)

§ 124, Jud. Code (Appendix, *post*), concerns the appointment of a clerk, and sets out his duties pertaining to matters within the court's jurisdiction.

§ 125, Jud. Code (Appendix, *post*), sets out the right of the clerk to appoint deputies subject to approval by the court; the rights and duties of said deputies in case of death of clerk and their liabilities; the liabilities of administrator and executor upon defaults and misfeasances caused after death of clerk.

§ 123, Jud. Code (Appendix, *post*), sets out the rights and duties of United States marshals in reference to these courts.

§ 1472. Terms. § 126, Jud. Code (Appendix, *post*), provides for terms to be held annually by the circuit court of appeals in the several judicial circuits at the following places and at such

times as fixed by the court: First circuit, Boston; second circuit, New York; third circuit, Philadelphia; fourth circuit, Richmond; fifth circuit, New Orleans, Atlanta, Fort Worth and Montgomery; sixth circuit, Cincinnati; seventh circuit, Chicago; eighth circuit, St. Louis, Denver, or Cheyenne, and St. Paul; ninth circuit San Francisco, and each year in two other places in said circuit to be designated by judges of said Court; and in each of the above circuits, terms may be held at such other times and places as may be designated by each respective court.

This section goes on to state that there are certain dates on which said terms shall be held in various circuits, and what matters are to be taken up at this time.

§ 1473. Rules of Procedure. § 122, Jud. Code (Appendix, *post*), concerns the procedure of the various circuit courts of appeals and contains all information regarding seals, writs, and process as conformable to each court's jurisdiction. Under the authority of this statute, rules have been promulgated for each of the nine circuits.

These rules are so similar in many respects that they are printed in our Appendix as one set of rules with notations of differences where any exist in any of the several circuits from the general rule existing in the other circuits.

In taking an appeal in any circuit these rules should be consulted.

§ 1474. Admission to Practice. Under Rule 7 Circuit Court of Appeals in all circuits, an attorney may be admitted to practice in the circuit court of appeals when admitted to practice in the Supreme or District Court of the United States on taking the oath or affirmation in the form prescribed in rule 2 of the Supreme Court of the United States. In the sixth, eighth and ninth circuits it is enough if the attorney has been admitted to the court of last resort in the state of his residence and takes the requisite oaths. Fees are prescribed in last-named circuits.

§ 1475. Reports of Decisions. All decisions from the time when the circuit courts of appeals were established, in 1891, have been reported currently in the Federal Reporter, and are now reported also in the C. C. A. Reports, of which there are now more than one hundred volumes.

CHAPTER 71.

APPELLATE JURISDICTION OF CIRCUIT COURT OF APPEALS.

SEC.

1500. Appellate Jurisdiction.
1501. Appeal and Error from District Courts to Circuit Court of Appeals.
1502. Appeals from Interlocutory Orders in Injunction and Receivership Proceedings in District Courts.
1503. Appellate and Supervisory Jurisdiction in Bankruptcy Cases.
1504. Appeal and Error from the United States Court for China.
1505. Appeals and Writs of Error from District Court for Alaska.
1506. Place of Hearing of Appeals and Writs of Error from Alaska.
1507. Appellate Jurisdiction from District Court Canal Zone.
1508. Appellate Jurisdiction—The Danish West Indian Islands.
1509. Appellate Jurisdiction—Porto Rico.
1510. Powers and Duties of Judges upon Appeal.

§ 1500. Appellate Jurisdiction. The jurisdiction of the circuit courts of appeals is wholly appellate, and is governed by chapter 6, Jud. Code, § 128 et seq., which sections are largely re-enactments of the act of Mar. 3, 1891, c. 517.

The jurisdiction includes not only appeals and writs of error from certain final decisions in district courts, under § 128, Jud. Code (§ 1501, *post*), including Hawaii and Porto Rico, and under § 134, Jud. Code (§ 1505, *post*), Alaska, but also appeals from interlocutory orders granting, refusing, dissolving, or refusing to dissolve an injunction, or appointing a receiver, under § 129, Jud. Code (§ 1502, *post*), and in bankruptcy cases under § 130, Jud. Code (§ 1503, *post*), and appeals and writs of error from the United States court for China, under § 131, Jud. Code (§ 1504, *post*), and in the fifth circuit from final judgments and decrees of the district courts in the Canal Zone, under part § 9, Act Aug. 24, 1912, c. 390 (§ 1507, *post*). As to Danish West India and Porto Rico, see §§ 1508, 1509, below.

§ 1501. Appeal and Error from District Courts to Circuit Court of Appeals.

§ *128, Jud. Code* (*as amended Act Jan. 28, 1915, c. 22, § 2, Re-enacting part of § 6, Act of March 3, 1891, 26 Stats. 828*). "The circuit court of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions[1] in the district courts, including the United States district court for Hawaii and the United States district court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit court of appeals shall be final[2] in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the trademark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in all admiralty cases." (5 Fed. Stats. Ann., 2d ed., p. 607; 2 U. S. Comp. Stats. 1916, § 1120; Foster's Federal Practice, 5th ed., pp. 1979, 2374, 2410, 2436; Simkins' Federal Equity Suit, 3d ed., p. 622.)

Final judgments and decrees appealable from district courts to the circuit court of appeal are determined by a process of elimination, and include "all final decisions in district courts, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in § 238, Jud. Code, unless otherwise provided by law."

1 "Final decision" means a final decision which was then appealable under the existing law.

North American Trading Co. v. Smith, 93 Fed. 7, 35 C. C. A. 183. Appellate jurisdiction, Four Hundred and Forty-three Cans of Frozen Egg Product v. United States, 226 U. S. 172, 57 **L. Ed.** 174, 33 Sup. Ct. 50, reversing United States v. Four Hundred and Forty-three Cans of Frozen Egg Product, 193 Fed. 589, 113 C. C. A. 457.

2 Final decisions of C. C. A., see Missouri, Kansas & Texas Ry. Co. v. Wulf, 226 U. S. 570, 57 **L. Ed.** 355, 33 Sup. Ct. 135.

Final decisions of districts courts, In re Metropolitan Trust Co., 218 U. S. 312, 54 **L. Ed.** 1051, 31 Sup. Ct. 18.

§ 1502. Appeals from Interlocutory Orders in Injunction and Receivership Proceedings in District Courts.

§ *129, Jud. Code* (*Re-enacting § 7, Act of March 3, 1891, 31 Stats. 660*). "Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction, or appointing a receiver to the circuit court of appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: *Provided,* That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof, during the pendency of such appeal: *Provided, however,* That the court below may, in its discretion, require as a condition of the appeal an additional bond." (36 Stats. 1134; 5 Fed. Stats. Ann., 2d ed., p. 629; 2 U. S. Comp. Stats. 1916, § 1121, p. 1444; Foster's Federal Practice, 5th ed., pp. 930, 1943, 2411, 2436; Simkins' Federal Equity Suit, 3d ed., pp. 626, 627, 628, 629.)

The purpose of this section is to save the parties from the expense of further litigation should the appellate court be of the opinion that plaintiff was not entitled to an injunction because his bill had no equity to support it. (Smith v. Vulcan Iron Works, 165 U. S. 518, 41 **L. Ed.** 810, 17 Sup. Ct. 407; Jackson Co. v. Gardiner Inv. Co., 200 Fed. 113, 118 C. C. A. 287; Pioneer Lace Mfg. Co. v. Dodd, 181 Fed. 688, 104 C. C. A. 586; Pressed Steel Car Co. v. Chicago & A. R. Co., 192 Fed. 517, 113 C. C. A. 73.)

§ 1503. Appellate and Supervisory Jurisdiction in Bankruptcy Cases.

§ *130, Jud. Code.* "The circuit courts of appeals shall have the appellate and supervisory jurisdiction conferred upon them by the act entitled, 'An Act to Establish a Uniform

System of Bankruptcy throughout the United States,' approved July 1, 1898, and all laws amendatory thereof, and shall exercise the same in the manner therein prescribed." (36 Stats. 1134; 5 Fed. Stats. Ann., 2d ed., p. 643; 2 U. S. Comp. Stats. 1916, § 1122.)

This section is only declaratory of the appellate jurisdiction conferred upon the circuit court of appeals by §§ 24 and 25 of the bankruptcy act of 1898, and for a full treatment of this jurisdiction we refer to that act and to the various works on bankruptcy.

§ 1504. Appeal and Error from the United States Court for China.

§ *131, Jud. Code.* "The circuit court of appeals for the ninth circuit is empowered to hear and determine writs of error and appeals from the United States court for China as provided in the act entitled, 'An Act Creating a United States Court for China and Prescribing the Jurisdiction Thereof,' approved June 30, 1906." (36 Stats. 1134; 5 Fed. Stats. Ann., 2d ed., p. 643; 2 U. S. Comp. Stats. 1916, § 1123; Foster's Federal Practice, 5th ed., pp. 280, 2411, 2539.)

This section, like the preceding one, is merely declaratory of the appellate jurisdiction conferred by § 3 of the act referred to.

§ 1505. Appeals and Writs of Error from District Court for Alaska.

§ *134, Jud. Code.* "In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in § 247, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases, writs of error and appeals shall lie from the district court for Alaska or from any division thereof to the circuit court of appeals for the ninth circuit, and the judgments, orders, and decrees of said court shall be final in all such cases. But whenever such circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such case, the court may certify such question or proposition to the Su-

preme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instruction shall be binding upon the circuit court of appeals." (36 Stats. 1134; 5 Fed. Stats. Ann., 2d ed., p. 644; 2 U. S. Comp. Stats. 1916, § 1125; Foster's Federal Practice, 5th ed., pp. 2411, 2437, 2539.)

§ 1506. Place of Hearing of Appeals and Writs of Error from Alaska.

§ *135, Jud. Code.* "All appeals and writs of error, and other cases, coming from the district court for the district of Alaska to the circuit court of appeals for the ninth circuit, shall be entered upon the docket and heard at San Francisco, California, or at Portland, Oregon, or at Seattle, Washington, as the trial court before whom the case was tried below shall fix and determine: *Provided,* That at any time before the hearing of any appeal, writ of error, or other cases, the parties thereto, through their respective attorneys, may stipulate at which of the above-named places the same shall be heard, in which case the case shall be remitted to and entered upon the docket at the place so stipulated, and shall be heard there." (36 Stats. 1135; 5 Fed. Stats. Ann., 2d ed., p. 646; 2 U. S. Comp. Stats. 1916, § 1126.)

§ 1507. Appellate Jurisdiction from District Court Canal Zone.

Part § 9, Act Aug. 24, 1912, c. 390 (Re-enacting Act of Jan. 11, 1909, c. 15, 35 Stats. at L. 585). "The circuit court of appeals of the fifth circuit of the United States shall have jurisdiction to review, revise, modify, reverse, or affirm the final judgments and decrees of the district court of the Canal Zone and to render such judgments as in the opinion of the said appellate court should have been rendered by the trial court in all actions and proceedings in which the Constitution, or any statute, treaty, title, right, or privilege of the United States, is involved and a right thereunder denied, and in cases in which the value in controversy exceeds one thousand dollars, to be ascertained by the oath of either party, or by other competent evidence, and also in criminal causes wherein the offense charged is punishable as a felony. And such appellate

jurisdiction, subject to the right of review by or appeal to the Supreme Court of the United States as in other cases authorized by law, may be exercised by said circuit court of appeals in the same manner, under the same regulations, and by the same procedure as nearly as practicable as is done in reviewing the final judgments and decrees of the district courts of the United States." (37 Stats. 566; Fed. Stats. Ann., 2d ed., title "Rivers, Harbors and Canals"; 10 U. S. Comp. Stats. 1916, § 10,045.)

§ 1508. Appellate Jurisdiction—The Danish West Indian Islands.

Act Mch. 3, 1917, c. 171, pt. § 2 (Courts, etc.). ". . . The jurisdiction of the judicial tribunals of said islands shall extend to all judicial proceedings and controversies in said islands to which the United States or any citizen thereof may be a party. In all cases arising in the said West Indian Islands and now reviewable by the courts of Denmark, writs of error and appeals shall be to the Circuit Court of Appeals for the Third Circuit, and, except as provided in sections two hundred and thirty-nine and two hundred and forty of the Judicial Code, the judgments, orders, and decrees of such court shall be final in all such cases." (U. S. Comp. Stats. 1916, § 3924b; 239 Fed. Adv. Sheets No. 2, Supp., p. 129.)

§ 1509. Appellate Jurisdiction—Porto Rico.

Act March 2, 1917, c. 145, § 42. "(Appeals and removal of causes from and writs of error and *certiorari* to courts of Porto Rico; terms of court of district court; pleadings and proceedings to be in English language; district court attached to first circuit; appeals to and review by circuit court of appeals and Supreme Court of United States.)

"The laws of the United States relating to appeals, writs of error and *certiorari*, removal of causes, and other matters or proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the district court of the United States and the courts of Porto Rico. Regular terms of said United States district court shall be held at San Juan, commencing on the first Monday in May and November of each

year, and also at Ponce on the second Monday in February of each year, and special terms may be held at Mayaquez at such stated times as said judge may deem expedient. All pleadings and proceedings in said court shall be conducted in the English language. The said district court shall be attached to and included in the first circuit of the United States, with the right of appeal and review by said circuit court of appeals in all cases where the same would lie from any district court to a circuit court of appeals of the United States, and with the right of appeal and review directly by the Supreme Court of the United States in all cases where a direct appeal would be from such district courts." (Fed. Stats. Ann., 2d ed., 1918 Supp., title "Porto Rico"; Pamph. Supp. Nos. 9, 10, January-April, 1917, p. 94; U. S. Comp. Stats. 1917, Supp. § 3803r, Adv. Sheets, 239 Fed. No. 1, p. 80.)

Appellate Jurisdiction from Supreme Court, Porto Rico.

Act March 2, 1917, c. 145, § 43. "Writs of error and appeals from the final judgments and decrees of the Supreme Court of Porto Rico may be taken and prosecuted to the Circuit Court of Appeals for the First Circuit and to the Supreme Court of the United States, as now provided by law." (Fed. Stats. Ann., 2d ed., 1918 Supp., title "Porto Rico"; Pamph. Supp. Nos. 9, 10, January-April 1917, p. 94; U. S. Comp. Stats. 1917, Supp. § 3803rr, Adv. Sheets, 239 Fed. No. 1, p. 80.)

§ 1510. Powers and Duties of Judges upon Appeal.

§ 132, Jud. Code (Re-enacting § 11 of C. C. A. Act of March 3, 1891, c. 517, 26 Stats. at L. 829). "Any judge of a circuit court of appeals, in respect of cases brought or to be brought before that court, shall have the same powers and duties as to allowances of appeals and writs of error, and the condition of such allowances, as by law belong to the justices or judges in respect of other courts of the United States respectively." (36 Stats. 1134; 5 Fed. Stats. Ann., 2d ed., p. 643; 2 U. S. Comp. Stats. 1916, § 1124; Simkins' Federal Equity Suit, 3d ed., p. 676.)

CHAPTER 72.

THE SUPREME COURT.

SEC.

1530. Judges, Clerks, Deputies and Marshal.
1531. Supreme Court Reporter.
1532. Admission to Practice.
1533. Terms and Adjournments.
1534. Powers and Jurisdiction.

§ 1530. Judges, Clerks, Deputies and Marshal. § 215, Jud. Code (Appendix, *post*), provides for a chief justice and eight associate justices, any six constituting a quorum.

§ 216, Jud. Code (Appendix, *post*), gives precedence to judges in order of commission, except when same date, when age gives precedence.

§ 217, Jud. Code (Appendix, *post*), confers on associate justice, who is first in precedence, the powers of chief justice when there is a vacancy or when the chief justice is incapable of performing the duties and powers of his office.

§ 218, Jud. Code (Appendix, *post*), provides that the chief justice of the Supreme Court of the United States shall receive $15,000 per annum, and the associate justices $14,500 each per annum, payable monthly.

§ 219, Jud. Code (Appendix, *post*), gives the Supreme Court power to appoint a clerk and a marshal, and a reporter of its decisions.

§ 220, Jud. Code (Appendix, *post*), relates to the rights, powers and duties of the clerk of the Supreme Court of the U. S. Also provides as to his bond.

§ 221, Jud. Code (Appendix, *post*), sets out the fact that deputies may be appointed by the court on application of the clerk; provides as to the misfeasances and defaults of said deputies and their relation to the clerk's estate in case of his death.

§ 224, Jud. Code (Appendix, *post*). The marshal is entitled to a salary of $4,500 per annum; sets out his duties, rights and powers; states he may appoint assistants, with the approval of the court.

§ 1531. Supreme Court Reporter. The duties of the reporter are defined in § 225, Jud. Code, his salary and allowances are designated in § 226, Jud. Code, and the distribution of reports and digests is set out in § 227, Jud. Code. The cost of these books and provision for additional reports and digests is made in § 228, Jud. Code. Provision is made for distribution of sets of the Federal Reporter and Digests in § 229, Jud. Code. These sections may be found with annotations in the Appendix.

§ 1532. Admission to Practice.

Rule 2 of the Supreme Court of the United States. "1. It shall be requisite to the admission of attorneys or counselors to practise in this court, that they shall have been such for three years past in the supreme courts of the states to which they respectively belong, and that their private and professional character shall appear to be fair.

"2. They shall respectively take and subscribe the following oath or affirmation, viz.:

"I, —— ——, do solemnly swear [or affirm] that I will demean myself, as an attorney and counselor of this court, uprightly, and according to law; and that I will support the Constitution of the United States."

§ 255, Jud. Code (Appendix, *post*), provides that any woman a member of the bar for three years, of good standing, good moral character, and who can produce such record, shall be admitted to practice before the Supreme Court of the United States.

§ 1533. Terms and Adjournments. § 230, Jud. Code (Appendix, *post*). The Supreme Court holds at the seat of government, one term annually, commencing on the second Monday in

October, and such adjourned or special terms as it may find necessary in its dispatch of business.

§ 231, Jud. Code (Appendix, *post*). If, at any session of the Supreme Court, a quorum does not attend on the day appointed for holding it, the justices who do attend may adjourn the court from day to day for twenty days after said appointed time, unless there be sooner a quorum. If a quorum does not attend within said twenty days, the business of the court shall be continued over till the next appointed session; and if, during a term, after a quorum has assembled, less than that number attend on any day, the justices attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

§ 1534. Powers and Jurisdiction. § 233, Jud. Code (Appendix *post*), relates to the jurisdiction of the Supreme Court of the United States, as to interstate and foreign matters.

§ 235, Jud. Code (Appendix, *post*). "The trial of issues of fact in the Supreme Court in all actions of law against citizens of the United States, shall be by Jury."

§ 234, Jud. Code (Appendix, *post*), sets out the power of the court to issue writs of prohibition to the district court in certain cases and the power to issue writs of *mandamus* to any courts or persons holding authority under the United States, when such proceedings will be warranted.

CHAPTER 73.

APPELLATE JURISDICTION OF SUPREME COURT.

SEC.
1550. In General.
1551. Appeals from District Courts Direct to the Supreme Court.
1552. What Constitutes a Question of Jurisdiction.
1553. Rules for Determining the Respective Jurisdiction of the Circuit Courts of Appeal, and the Supreme Court Where the Jurisdiction of the Court is in Issue.
1554. Appeals from Final Sentences and Decrees in Prize Causes.
1555. Cases Involving the Construction or Application of the United States Constitution.
1556. Constitutionality of United States Law, or Validity or Construction of Treaty Drawn in Question.
1557. State Law or Constitution Claimed to Contravene the Constitution of the United States.
1558. Clauses 3, 4, and 5 of § 238, Judicial Code.
1559. Appeal and Error—Circuit Court of Appeals to Supreme Court.
1560. Appellate Jurisdiction of the Supreme Court in Cases from Court of Claims.
1561. Appeal and Error to Supreme Court from Hawaii, Porto Rico, Alaska, Philippine Islands, District of Columbia and Bankruptcy Courts.
1562. Prohibition, Mandamus and Other Writs to Revise and Correct Proceedings in Lower Courts, and Preserve Jurisdiction.

§ 1550. In General. The appellate jurisdiction of the Supreme Court is now prescribed by chapter 10, Jud. Code, § 236 et seq. It is to be noted that the "appellate jurisdiction conferred by this chapter includes jurisdiction of writs of error as well as appeals, and the most of the sections herein quoted apply alike to appellate procedure in law as well as in equity.

The appellate jurisdiction of the Supreme Court, as herein treated, is divided into two general classes:

1. Appellate jurisdiction over decisions of district courts.

2. Appellate jurisdiction over decisions of circuit court of appeals.

The appellate jurisdiction of the Supreme Court over state courts is treated in chapter 74, under the head of "Writ of Error to State Court of Last Resort." The Supreme Court has also appellate jurisdiction over the decrees of the Court of Claims, the courts of Porto Rico, Hawaii, Alaska, the Philippine Islands, District of Columbia, and bankruptcy courts.

§ 1551. Appeals from District Courts Direct to the Supreme Court.

§ 238, Jud. Code, as amended Act Jan. 28, 1915, c. 22 (Drawn from Act March 3, 1891, § 5, c. 517, 26 Stats. at L. 827). "Appeals and writs of error may be taken from the district courts including the United States district court for Hawaii and the United States district court for Porto Rico, direct to the Supreme Court in the following cases:

"(1) In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; (2) from the final sentences and decrees in prize causes; (3) in any case that involves the construction or the application of the Constitution of the United States; (4) in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; (5) and in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States." (36 Stats. 1157; 38 Stats. 803; 5 Fed. Stats. Ann., 2d ed., p. 794; 2 U. S. Comp. Stats. 1916, § 1215; Foster's Federal Practice, 5th ed., pp. 1980, 2361, 2369, 2390, 2436, 2456, 2539.)

A direct appeal is allowed to the Supreme Court from orders affecting the Interstate Commerce Commission.

Part Act October 22, 1913, c. 32. " . . . An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of

any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. . . . A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the State." (38 Stats. 220; 5 Fed. Stats. Ann., 2d ed., p. 1113; 1 U. S. Comp. Stats. 1916, pt. § 998, p. 836, and § 1000, p. 837.)

In order to maintain jurisdiction in the Supreme Court in the class of cases covered by clause No. 1, of the above-quoted section of the Judicial Code, the record must distinctly show, without equivocation, that the court below sends up for consideration the single and definite question of jurisdiction.[1]

No other question except that of jurisdiction can be certified to the Supreme Court under this provision, but it has been held[2] that if the case is taken to the Supreme Court on the single ground of jurisdiction and is thus before that court, then the Supreme Court will pass upon questions of fact where the decision below was erroneous, and may then set aside the judgment of the court below.

§ 1552. What Constitutes a Question of Jurisdiction. The question of jurisdiction may be certified to the Supreme Court upon the following grounds:

(1) Where it appears that process has not been served.[3]

1 Arkansas v. Schlierholz, 179 U. S. 600, 45 **L. Ed.** 336, 21 Sup. Ct. 229; Shields v. Coleman, 157 U. S. 168, 39 **L. Ed.** 660, 15 Sup. Ct. 570; Chappell v. United States, 160 U. S. 499, 40 **L. Ed.** 510, 16 Sup. Ct. 397; Mexican C. R. Co. v. Echman, 187 U. S. 429, 47 **L. Ed.** 245, 23 Sup. Ct. 211; Cosmopolitan Mining Company v. Walsh, 193 U. S. 460, 48 **L. Ed.** 749, 24 Sup. Ct. 489; Anglo-American Provision Company v. Davis Provision Co., 191 U. S. 376, 48 **L. Ed.** 228, 24 Sup. Ct. 93.

2 Commercial Mutual Accident Co. v. Davis, 231 U. S. 256, 53 **L. Ed.** 787, 29 Sup. Ct. 445.

3 Board of Trade v. Hammond Elevator Co., 198 U. S. 424, 49 **L. Ed.** 1111, 25 Sup. Ct. 740; Remington v. Central Pac. R. Co., 198 U. S. 95, 49 **L. Ed.** 959, 25 Sup. Ct. 577; Kendall v. American Automatic Loom Co., 198

(2) Where a party sues as assignee in a case in which his assignor could not have maintained the action.[4]

(3) In cases of improper removal from a state court.[5]

(4) Whenever the jurisdiction of the court below has been directly attacked (under former equity rules, by plea or demurrer, now by motion to dismiss or by answer.)[6]

But the objection that a court of equity has no jurisdiction because of the presence of an adequate remedy at law does not constitute sufficient grounds for certification of the question of jurisdiction to the Supreme Court.[7]

§ 1553. Rules for Determining the Respective Jurisdiction of the Circuit Courts of Appeal, and the Supreme Court Where the Jurisdiction of the Court is in Issue. Inasmuch as only "the question of jurisdiction alone" may be certified directly to the Supreme Court, under clause (1) of § 238, Jud. Code (§ 1551, *supra*), we must consider the effect of a mixture of questions of jurisdiction, and of issues on the merits of the case.

The Supreme Court, in the case of U. S. v. John, 155 U. S. 109, 39 **L. Ed.** 87, 15 Sup. Ct. 39, has laid down six rules, governing the various situations which arise in connection with this situation, as follows:

"(1) If the jurisdiction of the circuit court is in issue, and decided in favor of the defendant, as that disposes of the case,

U. S. 477, 49 **L. Ed.** 1133, 25 Sup. Ct. 768; Davis v. Cleveland C. C. & St. L. R. R. Co., 217 U. S. 157, 54 **L. Ed.** 708, 27 **L. R. A. (N. S.)** 823, 30 Sup. Ct. 463, 156 Fed. 775, 84 C. C. A. 453; St. Louis Cotton Compress Co. v. American Cotton Co., 60 C. C. A. 80, 125 Fed. 196.

[4] Barling v. Bank of British N. A., 50 Fed. 261, 1 C. C. A. 510, 7 U. S. App. 194.

[5] Powers v. Chesapeake & Ohio R. R. Co., 169 U. S. 92, 42 **L. Ed.** 673, 18 Sup. Ct. 264; Kansas City N. W. R. R. Co. v. Zimmerman, 210 U. S. 336, 52 **L. Ed.** 1084, 28 Sup. Ct. 730.

[6] Davis & Rankin Bldg. & Mfg. Co. v. Barber, 60 Fed. 465, 9 C. C. A. 79, 18 U. S. App. 476; Hennessy v. Richardson Drug Co., 189 U. S. 25, 47 **L. Ed.** 697, 23 Sup. Ct. 532; The Alliance, 70 Fed. 274, 17 C. C. A. 124, 44 U. S. App. 52; Equity Rule 29.

[7] Kansas City N. W. R. R. Co. v. Zimmerman, 210 U. S. 338, 52 **L. Ed.** 1084, 28 Sup. Ct. 730; Louisville Trust Co. v. Knott, 191 U. S. 225, 48 **L. Ed.** 159, 24 Sup. Ct. 119; Blythe v. Hinkley, 173 U. S. 501, 43 **L. Ed.** 783, 19 Sup. Ct. 497; United States ex rel. Mudsill Mining Co. v. Swan, 65 Fed. 647, 13 C. C. A. 77, 31 U. S. App. 112.

the plaintiff should have the question certified, and take his appeal or writ of error directly to this court. (2) If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the circuit court of appeals, where, if the question of jurisdiction arises, the circuit court of appeals may certify it. (3) If the question of jurisdiction is in issue, and the jurisdiction sustained, and the judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified, and come directly to this court, or to carry the whole case to the circuit court of appeals, and the question of jurisdiction can be certified by that court. (4) If in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the circuit court of appeals on the merits, and this he may do by way of cross appeal or writ of error if the defendant has taken the case there, or independently if the defendant has carried the case to this court on the question of jurisdiction alone, and in this instance the circuit court of appeals will suspend a decision upon the merits until the question of jurisdiction has been determined. (5) The same observations are applicable where a plaintiff objects to the jurisdiction, and is, or both parties are, dissatisfied with the judgment on the merits. (6) In every case in which the complaining party has the right or has and exercises the option to carry his case to the circuit court of appeals for review, that court may decide the question of jurisdiction as well as the question on the merits, for the power of that court to certify the question of jurisdiction to the Supreme Court assumes the power to decide it."[8]

[8] See also New Orleans v. Benjamin, 153 U. S. 411, 38 L. Ed. 764, 14 Sup. Ct. 905; Evans-Snider-Buel Co. v. McCaskill, 101 Fed. 658, 41 C. C. A. 577; McLish v. Roff, 141 U. S. 661, 35 L. Ed. 895, 12 Sup. Ct. 118; Harris v. Rosenberger, 145 Fed. 449, 13 L. R. A. (N. S.) 762, 76 C. C. A. 225; Gates v. Bucki, 53 Fed. 965, 4 C. C. A. 116, 12 U. S. App. 69; Carter v. Roberts, 177 U. S. 500, 44 L. Ed. 863, 20 Sup. Ct. 713; Reliable Incubator & Brooder Co. v. Stahl, 105 Fed. 667, 44 C. C. A. 657; Northern P. R. Co. v. Glaspell,

It is evident, then, that if the jurisdiction of the district court is put in issue with other issues on the merits, then an election is given to the party desiring to appeal. He may have the question of jurisdiction alone certified directly to the Supreme Court,—or he may appeal the entire case on the merits, to the circuit court of appeals, whereupon that court may either determine the jurisdictional question itself, or may certify it to the Supreme Court for determination.[9]

Whether the same party may prosecute two appeals from the same determination of his suit, having the question of jurisdiction certified directly to the Supreme Court, while he appeals from the decision and the merits to the circuit court of appeals, is doubtful. The circuit court of appeals has held[10] that this is permissible, but the Supreme Court has reached the opposite conclusion.[11]

§ 1554. Appeals from Final Sentences and Decrees in Prize Causes. The second clause of § 238, Jud. Code (§ 1551, *supra*); confers upon the Supreme Court the jurisdiction of appeals from all final decrees in prize causes. The amount in controversy is immaterial, and no certificate of the district judge as to the importance of the particular case is required.[12]

§ 1555. Cases Involving the Construction or Application of the United States Constitution. Under the third clause of § 238, Jud. Code (§ 1551, *supra*), the district court must have actually construed or applied the Constitution to the case, or must have declined to do so upon being requested so to do.[13] The mere fact

49 Fed. 482, 1 C. C. A. 327, 4 U. S. App. 238; Robinson v. Caldwell, 165 U. S. 361, 41 **L. Ed.** 746, 17 Sup. Ct. 343.

9 *Ibid.*

10 Pullman Palace Car Co. v. Central Transportation Co., 76 Fed. 402, 22 C. C. A. 246, 39 U. S. App. 307.

11 American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 45 **L. Ed.** 859, 21 Sup. Ct. 646. See also Robinson v. Caldwell, 165 U. S. 359, 41 **L. Ed.** 745, 17 Sup. Ct. 343; Columbus Const. Co. v. Crane Company, 174 U. S. 601, 43 **L. Ed.** 1103, 19 Sup. Ct. 721; Union & Planters' Bank v. Memphis, 189 U. S. 74, 47 **L. Ed.** 714, 23 Sup. Ct. 604.

12 Paquete v. Habana, 175 U. S. 677, 44 **L. Ed.** 320, 20 Sup. Ct. 290.

13 Cornell v. Green, 163 U. S. 75, 41 **L. Ed.** 76, 16 Sup. Ct. 969.

that the Constitution *might* have been involved, or *might* have been challenged, if it was not actually so involved or challenged, does not vest the Supreme Court with jurisdiction.[14]

The clause has been held to include a case involving the constitutional power of Congress over the navigable waters of the United States;[15] a case involving the right of citizens of a state to vote for congressmen of the United States;[16] a case in which the question whether the complainants are engaged in Interstate Commerce under paragraph 3 of § 8 of article I of the Constitution is involved.[17]

§ 1556. Constitutionality of United States Law, or Validity or Construction of Treaty Drawn in Question. As in cases included under the preceding clause, the questions must be actually involved, and the court must have been required to pass upon them in reaching this decision.[18] Allegations that the questions were involved, if not supported by the facts of the case, do not vest the Supreme Court with jurisdiction.[19] Questions of fact, although the facts be the outgrowth of the operation of a treaty or statute, do not confer jurisdiction upon the Supreme Court, as the validity or construction of a statute or treaty, or the constitutionality of a United States law, involves only questions of law.[20]

§ 1557. State Law or Constitution Claimed to Contravene the Constitution of the United States. The general requirement and propositions of law applicable to this clause are similar to those applicable to the two preceding clauses, and will be discussed jointly with them in the succeeding sections.

[14] World's Columbian Exposition v. United States, 56 Fed. 654, 6 C. C. A. 58; Northern Pacific R. R. Co. v. Amato, 144 U. S. 465, 472, 36 L. Ed. 596, 12 Sup. Ct. 740; Snow v. United States, 118 U. S. 346, 30 L. Ed. 207, 6 Sup. Ct. 1059.

[15] Cummings v. Chicago, 188 U. S. 410, 47 L. Ed. 525, 23 Sup. Ct. 472.

[16] Wiley v. Sinkler, 179 U. S. 62, 45 L. Ed. 84, 21 Sup. Ct. 17.

[17] Macon v. Georgia Packing Co., 60 Fed. 781, 9 C. C. A. 262.

[18] Muse v. Arlington Hotel Company, 168 U. S. 430, 42 L. Ed. 531, 18 Sup. Ct. 109.

[19] Budzisz v. Illinois Steel Co., 170 U. S. 41, 42 L. Ed. 941, 18 Sup. Ct. 503.

[20] In re Newman, 79 Fed. 615; Borgmeyer v. Idler, 159 U. S. 408, 40 L. Ed. 199, 16 Sup. Ct. 34.

"A state law" includes municipal ordinances as the acts of a state perpetrated through its properly constituted instrumentality, and if the constitutionality of such ordinances is involved the case comes within the purview of this clause.[21] However, a state law which is void under the state Constitution, as well as being in contravention of the Constitution of the United States, cannot raise the question so as to give the Supreme Court jurisdiction.[22]

§ 1558. Clauses 3, 4, and 5 of § 238, Jud. Code (§ 1551, supra). The questions included under the 3d, 4th, and 5th clauses of § 238, Jud. Code, relating to the Constitution, treaties, and laws of the United States, are so closely related, and partake so largely of the same nature that they have been construed and discussed together by the courts, and many of the rules and propositions of law which have been laid down apply to them all.

The Supreme Court has said: "When our jurisdiction is invoked under § 5 . . . on the ground that the case falls within the fourth, fifth, or sixth of the classes of cases therein enumerated, it must appear that a title, right, privilege, or immunity was claimed under the Constitution, and a definite issue in respect to the possession of the right must be distinctly deducible from the record; or that the constitutionality of the particular law or the validity or construction of the particular treaty was necessarily and directly drawn in question; or that the Constitution or law of a state was distinctly claimed to be in contravention of the Constitution of the United States."

Where an appeal or writ of error is taken direct to the Supreme Court under clauses 3, 4, or 5 of § 238, Jud. Code, the Supreme Court acquires jurisdiction, not only of the questions specified in

21 Pike's Peak Power Co. v. Colorado Springs, 105 Fed. 1, 44 C. C. A. 333; Dawson v. Columbia Ave. Savings Fund etc. Co., 102 Fed. 200, 42 C. C. A. 258; City R. R. Co. v. Citizens St. R. R. Co., 166 U. S. 557, 41 L. Ed. 1114, 17 Sup. Ct. 653; Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341, 19 Sup. Ct. 77; St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 45 L. Ed. 788, 21 Sup. Ct. 575; Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. Ed. 778, 23 Sup. Ct. 498; Owensboro v. Owensboro Water Works, 115 Fed. 318, 53 C. C. A. 146.

22 Indianapolis v. Central Trust Co., 83 Fed. 529, 27 C. C. A. 580.

that section, but of all the questions involved in the entire case. This is shown by the fact that under § 238, Jud. Code, where an appeal or writ of error is taken direct to the Supreme Court in a case in which the jurisdiction of the district court is in issue, it is specifically directed that the question of jurisdiction alone shall be certified to the Supreme Court; and there is no such limitation prescribed in regard to any of the other cases in which jurisdiction on appeal or error is conferred by § 238, Jud. Code.[23]

Upon review under these clauses a certificate, as required by clause (1) is unnecessary, and of no effect. The questions raised under any of the clauses of § 238, Jud. Code, must be real, and must represent substantial controversies, not only as to the principles involved, but as to the relation of the party by whom they are raised, to them.[24]

Under § 238, Jud. Code, only those questions which the record shows to have been raised in the lower court are available to confer jurisdiction in the Supreme Court, and an assignment of errors cannot be availed of to import questions into a cause which the record does not so show to have been raised.

§ 1559. Appeal and Error—Circuit Court of Appeals to Supreme Court. There are three classes of cases that may go from the circuit court of appeals to the Supreme Court: (1) Where the judgment of the circuit court of appeals is not made final and the matter in controversy shall exceed $1,000 besides costs. § 241, Jud. Code (Appendix, *post*); (2) On *certiorari* from the Supreme Court to the circuit court of appeals. § 240, Jud. Code (Appendix, *post*); (3) And on certification to the Supreme Court by the circuit court of appeals. § 239, Jud. Code (Appendix, *post*).

§ 1560. Appellate Jurisdiction of the Supreme Court in Cases from Court of Claims. By § 242, Jud. Code (Appendix, *post*), appeals from the Court of Claims are allowed the United States

[23] Horner v. United States, 143 U. S. 570, 36 L. Ed. 266, 12 Sup. Ct. 522.
[24] Lampasas v. Bell, 180 U. S. 284, 45 L. Ed. 527, 21 Sup. Ct. 368.

and on behalf of plaintiff where the amount in controversy exceeds $3,000 or his claim is forfeited under § 172, Jud. Code (Appendix, *post*).

These appeals shall be taken within ninety days, as provided § 243, Jud. Code (Appendix, *post*).

§ 1561. Appeal and Error to Supreme Court from Hawaii, Porto Rico, Alaska, Philippine Islands, District of Columbia and Bankruptcy Courts. *Hawaii and Porto Rico.* Under § 246, Jud. Code (Appendix, *post*), as amended § 2, Act of Jan. 28, 1915, c. 22, § 2, writs of error and appeals may be prosecuted from the Supreme Courts of Hawaii and Porto Rico the same as from courts of last resort of a state under § 237, Jud. Code (Appendix, *post*), and in all other cases by *certiorari* where petition is presented within six months from date of judgment or decree. Writs of error and appeal may be taken to circuit court of appeals where amount involved, exclusive of costs, exceeds the value of $5,000.

Alaska. Under § 247, Jud. Code (Appendix, *post*), certain of the Alaska district court judgments may be reviewed by the Supreme Court in the same time, manner and under the same regulations as from other district courts.

Philippine Islands. Likewise under acts superseding § 248, Jud. Code (Appendix, *post*), certain judgments of the Supreme Court of the Philippine Islands may be reviewed by the Supreme Court of the United States.

Territorial Courts After Admission as State. § 249, Jud. Code (Appendix, *post*), provides for review of judgments or decrees of territorial courts after the territory has been admitted as a state.

District of Columbia. Appellate proceedings from the court of appeals for the District of Columbia are governed by §§ 250, 251, Jud. Code (Appendix, *post*).

Bankruptcy Courts. Appellate jurisdiction in bankruptcy cases is conferred on the Supreme Court by § 252, Jud. Code (Appendix, *post*).

§ 1562. Prohibition, Mandamus and Other Writs to Revise and Correct Proceedings in Lower Court and Preserve Jurisdiction. Under § 234, Jud. Code (Appendix, *post*), formerly § 688, Rev. Stats., and § 262, Jud. Code (Appendix, *post*), formerly § 716, Rev. Stats., the Supreme Court has power to issue writs of prohibition, writs of *mandamus*, writs of *scire facias* and all other writs necessary to the exercise of its jurisdiction and agreeable to the usages and principles of law.

Under these provisions the Supreme Court may revise and correct District Court decisions by *mandamus* where relief cannot be obtained by appeal or error. (In re Pollitz, 206 U. S. 323, 51 **L. Ed.** 1081, 21 Sup. Ct. 729; Ex parte Harding, 219 U. S. 363, 37 **L. R. A. (N. S.)** 392, 55 **L. Ed.** 252, 31 Sup. Ct. 324.)

Mandamus will lie to compel the District Court to take jurisdiction in a proper case. (In re Pollitz, 206 U. S. 323, 51 **L. Ed.** 1081, 27 Sup. Ct. 729; Grossmayer, Petitioner, 177 U. S. 48, 44 **L. Ed.** 665, 20 Sup. Ct. 535.)

So also *mandamus* has been used to remand a case improperly removed, if the defect appears on the face of the record. (In re Winn, 213 U. S. 458, 53 **L. Ed.** 873, 29 Sup. Ct. 515.)

CHAPTER 74.

REMOVAL FROM STATE COURT OF LAST RESORT TO UNITED STATES SUPREME COURT BY WRIT OF ERROR—JURISDICTION.

SEC.

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1609. Procedure on Removal from State Courts of Last Resort.

§ 1600. In General. In addition to the removal of causes from state to Federal courts as treated in chapter 9, cases may be removed to the Supreme Court of the United States under § 237, Jud. Code, after they have been finally decided by the highest state court having jurisdiction of the cause.

The grounds of removal under this section are more restricted than those previously enumerated, extending only to cases in which the decision of a state court is adverse to the Federal Constitution, treaties, laws, or authority, or to a right, title, privilege, or immunity claimed thereunder, the purpose of the review by the Supreme Court being to preclude any possibility of unconstitutional legislation by state courts.

The procedure upon removal under this section is identical with that upon writ of error to the Federal courts (§ 1656, *post*), except

that under § 999, Rev. Stats. (3 U. S. Comp. Stats. 1916, § 1659, p. 3317), the writ is allowed by a justice of the Supreme Court of the United States or by the chief justice, judge or chancellor of the state court and thirty days' notice must be given the adverse party.

§ 1601. Statute Regulating Removal by Writ of Error.

§ *237, Jud. Code (Re-enacting § 709, Rev. Stats.; amended Act Dec. 23, 1914, c. 20, and Act Sept. 6, 1916, c. 448, § 2).* "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a *writ of error*. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgments or decree of such state court, and may in its discretion award execution or remand the same to the court from which it was removed by the writ.

"It shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court, although the decision in such case may have been in favor of the validity of the treaty or statute or authority exercised under the United States or may have been against the validity of the State Statute or authority claimed to be repugnant to the Constitution, treaties, or laws of the United States, or in favor of the title, right, privilege, or immunity claimed under the Constitution, treaty, statute, commission, or authority of the United States." (36 Stats. 1156; amended 38 Stats. 790; 5 Fed. Stats. Ann., 2d ed., p. 723; 2 U. S. Comp. Stats. 1916,

§ 1214, p. 1580; Foster's Federal Practice, 5th ed., pp. 2436, 2538; Simkins' Federal Equity Suit, 3d ed., pp. 41, 746, 154.)

§ 1602. Writ of Error or Certiorari to Review State Court Decisions—Time for Taking. This section re-enacts § 709, Rev. Stats., the language of that section being unchanged except by the amendment above quoted.

A writ of error or *certiorari* are the methods by which the judgments or decrees of the highest courts of the states having jurisdiction of the suits can be reviewed by the United States Supreme Court, and consequently writs of error or *certiorari* can only issue to the state courts in cases within its purview.[1] Stipulation by parties to the cause cannot confer jurisdiction upon the Supreme Court.[2]

Under § 6, Act Sept. 6, 1916, c. 448 (2 U. S. Comp. Stats. 1916, § 1228a, p. 1805), the writ of error or *certiorari* must be sued out within three months of the date of entry of the judgment or decree.

§ 1603. What Judgment and Decrees Reviewable. It is only "*final* judgments or decrees[3] of the *highest court of a state in which a decision of the suit could be had,*" that are reviewable under this section. This does not limit the jurisdiction to the highest court of the state, but only to the highest court having jurisdiction of the particular cause to be reviewed.[4]

[1] Cohens v. Virginia, 6 Wheat. 264, 5 **L. Ed.** 257; Verden v. Coleman, 22 How. (U. S.) 192, 16 **L. Ed.** 336; Dower v. Richards, 151 U. S. 658, 38 **L. Ed.** 305, 14 Sup. Ct. 452, 17 Mor. Min. Rep. 704; Capitol Nat. Bank v. Cadiz Nat. Bank, 172 U. S. 425, 43 **L. Ed.** 502, 19 Sup. Ct. 202.

[2] Mills v. Brown, 16 Pet. 525, 10 **L. Ed.** 1055.

[3] McKnight v. James, 155 U. S. 687, 39 **L. Ed.** 310, 15 Sup. Ct. 248; Great Western Tel. Co. v. Burnham, 162 U. S. 341, 40 **L. Ed.** 991, 16 Sup. Ct. 850.

[4] Sullivan v. Texas, 207 U. S. 416, 52 **L. Ed.** 274, 28 Sup. Ct. 215; Bacon v. Texas, 163 U. S. 207, 41 **L. Ed.** 132, 16 Sup. Ct. 1023; Fisher v. Perkins, 122 U. S. 522, 30 **L. Ed.** 1192, 7 Sup. Ct. 1227; Great Western Tel. Co. v. Burnham, 162 U. S. 339, 40 **L. Ed.** 991, 16 Sup. Ct. 850; Clark v. Pennsylvania, 128 U. S. 395, 32 **L. Ed.** 487, 9 Sup. Ct. 113; Gregory v. McVeigh, 23 Wall. 294, 23 **L. Ed.** 156; Stanley v. Schwalby, 162 U. S. 255, 40 **L. Ed.** 960, 16 Sup. Ct. 754; Williams v. Bruffy, 102 U. S. 248, 26 **L. Ed.** 135; Downham v. Alexandria, 9 Wall. 659, 19 **L. Ed.** 807; Tinsley v. Anderson, 171 U. S. 101, 43 **L. Ed.** 91, 18 Sup. Ct. 805; Pepke v. Cronan, 155 U. S. 100, 39 **L. Ed.** 84, 15 Sup. Ct. 34; Newport Light Co. v. Newport, 151 U. S. 527, 38 **L. Ed.** 259, 14 Sup. Ct. 429, but see Olney v. Arnold, 3 Dall. 308, 1 **L. Ed.** 614, as to what is "highest court of State."

If, however, the state court to which the writ of error is to be addressed is not the highest court of the state, the record must affirmatively show that a decision of the case could not have been had in such court.[5] "Any suit," within the meaning of this section, has been held to include a proceeding for *mandamus;*[6] a proceeding for a writ of prohibition to restrain a municipal corporation from carrying an ordinance into effect;[7] but an order made by a judge in chambers, remanding a prisoner in *habeas corpus* proceedings, is not reviewable.[8]

§ 1604. Classification of Cases Reviewable. It is to be noted that this section confers appellate jurisdiction in three classes of cases:

1. The decision of the state court, in a suit in which is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States. (§ 1605, below.)

2. The decision of the state court, in a suit in which is drawn in question the validity of a statute or authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States. (§ 1606, below.)

3. Where the decision of the state court is either in favor of or against the title, right, privilege, or immunity claimed under the Constitution or any treaty or statute of, or commission held, or authority exercised under the United States. (§ 1607, below.)

§ 1605. Decision of State Court Involving the Validity of a Federal Treaty, Statute, or Authority, Their Validity Having Been Drawn in Question. Formerly the state court must have decided *against* the validity of the treaty or statute; otherwise there was no right to review.[9] The amendment of 1916 has changed this.

[5] Fisher v. Perkins, 122 U. S. 522, 30 **L. Ed.** 1192, 7 Sup. Ct. 1227; Mullen v. Western Union Beef Co., 173 U. S. 116, 43 **L. Ed.** 635, 19 Sup. Ct. 404.

[6] McPherson v. Blacker, 146 U. S. 1, 36 **L. Ed.** 869, 13 Sup. Ct. 3; Hartman v. Greenhow, 102 U. S. 672, 26 **L. Ed.** 271; American Exp. Co. v. Michigan, 177 U. S. 404, 44 **L. Ed.** 823, 20 Sup. Ct. 695.

[7] Weston v. Charlestown, 2 Pet. 449, 7 **L. Ed.** 481.

[8] McKnight v. James, 155 U. S. 685, 39 **L. Ed.** 310, 15 Sup. Ct. 248. See also Holmes v. Jennison, 14 Pet. 540, 10 **L. Ed.** 579.

The validity of the statute, treaty, or authority must be "drawn in question" if there is to be a review of the decision thereon by writ of error. In order to be "drawn in question," within the meaning of the section, it is not enough that rights claimed under a treaty or statute are controverted, or that acts are done which dispute the authority.[10] But the validity of a statute is "drawn in question" whenever the power to enact it as it is by its terms, or is made to read by construction, is fairly open to denial and is denied.[11] Authority exercised under the United States" must be real and existing,—not merely asserted. "Authority," as used in the section, stands upon the same footing as a treaty or statute; and if from the record it appears that the authority did not exist or was not in force, the decision of the state court will not be reviewed.[12] But the validity—not the exercise of the authority merely—must be drawn in question.[13]

And there is a palpable difference between the denial of the validity of the authority and a denial of a title, privilege, or right

9 Gordon v. Caldcleugh, 3 Cranch, 268, 2 **L. Ed.** 436; McIntire v. Wood, 7 Cranch, 504, 3 **L. Ed.** 420; McClung v. Silliman, 6 Wheat. 598, 5 **L. Ed.** 340; Williams v. Norris, 12 Wheat. 117, 6 **L. Ed.** 571; Montgomery v. Hernandez, 12 Wheat. 129, 6 **L. Ed.** 575; Menard v. Aspasia, 5 Pet. 505, 8 **L. Ed.** 207; Strader v. Baldwin, 9 How. 261, 13 **L. Ed.** 130; Ableman v. Booth, 21 How. 506, 16 **L. Ed.** 169; Reddall v. Bryan, 24 How. 420, 16 **L. Ed.** 740; Ryan v. Thomas, 4 Wall. (U. S.) 603, 18 **L. Ed.** 460; Baker v. Baldwin, 187 U. S. 61, 47 **L. Ed.** 75, 23 Sup. Ct. 19.

10 Kennard v. Nebraska, 186 U. S. 304, 46 **L. Ed.** 1175, 22 Sup. Ct. 879; Florida Cent. R. Co. v. Bell, 176 U. S. 321, 44 **L. Ed.** 486, 20 Sup. Ct. 399; Blackburn v. Portland Gold Min. Co., 175 U. S. 571, 44 **L. Ed.** 276, 20 Sup. Ct. 222, 20 Mor. Min. Rep. 358; Telluride Power Trans. Co. v. Rio Grande W. R. Co., 175 U. S. 639, 44 **L. Ed.** 305, 20 Sup. Ct. 245; Columbia Water Power Co. v. Col. E. S. R. C., 172 U. S. 475, 43 **L. Ed.** 521, 19 Sup. Ct. 247; Borgmeyer v. Idler, 159 U. S. 408, 40 **L. Ed.** 199, 16 Sup. Ct. 34; Bushnell v. Crooke Min. etc. Co., 148 U. S. 682, 37 **L. Ed.** 610, 13 Sup. Ct. 771; Cook County v. Calumet & C. Canal etc. Co., 138 U. S. 635, 34 **L. Ed.** 1110, 11 Sup. Ct. 435; Ferry v. King County, 141 U. S. 668, 35 **L. Ed.** 895, 12 Sup. Ct. 128; Baltimore Ry. Co. v. Hopkins, 130 U. S. 210, 32 **L. Ed.** 908, 9 Sup. Ct. 503.

11 Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 **L. Ed.** 908, 9 Sup. Ct. 503; Miller v. Cornwall Ry. Co., 168 U. S. 131, 42 **L. Ed.** 409, 18 Sup. Ct. 34.

12 Millingar v. Hartupee, 6 Wall. 258, 18 **L. Ed.** 829.

13 Walsh v. Columbus R. Co., 176 U. S. 469, 44 **L. Ed.** 548, 20 Sup. Ct. 393; Hamblin v. Western Land Co., 147 U. S. 531, 37 **L. Ed.** 267, 13 Sup. Ct. 353; New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 35 **L. Ed.** 943, 12 Sup. Ct. 142; Millingar v. Hartupee, 6 Wall. 258, 18 **L. Ed.** 829.

or immunity claimed under it. A denial of the latter does not present a federal question.[14] "Authority," as used in the section, is construed to mean personal authority, and not an abstract right created under a statute.[15] Consequently this clause has been applied in those cases in which the authority exercised by a public officer of the United States has been called in question,—not where a general right is set up under a statute.[16] Thus, a decision against the validity of the authority of the President of the United States to approve a deed of Indian treaty lands is reviewable under this clause;[17] as is the decision of a state court denying the claim of a disbursing officer of the United States that money in his hands due United States seamen could not be attached by process out of a state court.[18] A refusal by a state court to give effect to a judgment of a United States court rendered upon the point in dispute, with jurisdiction of the case and of the parties, involves the denial of the validity of an authority exercised under the United States, and may be reviewed by the Supreme Court.[19] A judgment of the supreme court of the District of Columbia is subject to review under this clause.[20]

[14] Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 **L. Ed.** 908, 9 Sup. Ct. 503; Abbott v. Tacoma Bank of Commerce, 175 U. S. 409, 44 **L. Ed.** 217, 20 Sup. Ct. 153; Cook County v. Calumet & C. Canal etc. Co., 138 U. S. 636, 34 **L. Ed.** 1110, 11 Sup. Ct. 435; United States v. Lynch, 137 U. S. 280, 34 **L. Ed.** 700, 11 Sup. Ct. 114; Clough v. Curtis, 134 U. S. 361, 33 **L. Ed.** 945, 10 Sup. Ct. 573.

[15] Telluride Power Transmission Co. v. Rio Grande Western R. Co., 175 U. S. 639, 44 **L. Ed.** 305, 20 Sup. Ct. 245.

[16] McGuire v. Massachusetts, 3 Wall. 387, 18 **L. Ed.** 226; Millingar v. Hartupee, 6 Wall. (U. S.) 258, 18 **L. Ed.** 829; Daniels v. Tearney, 102 U. S. 415, 26 **L. Ed.** 187; Sharpe v. Doyle, 102 U. S. 686, 26 **L. Ed.** 277; Buck v. Colbath, 3 Wall. 334, 18 **L. Ed.** 257.

[17] Pickering v. Lomax, 145 U. S. 310, 36 **L. Ed.** 716, 12 Sup. Ct. 860.

[18] Buchanan v. Alexander, 4 How. 20, 11 **L. Ed.** 857.

[19] Mutual L. Ins. Co. v. McGrew (1903), 188 U. S. 311, 63 **L. R. A.** 33, 47 **L. Ed.** 480, 23 Sup. Ct. 375; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 **L. Ed.** 619, 20 Sup. Ct. 506; Dupasseur v. Rochereau, 21 Wall. 130, 22 **L. Ed.** 588; Pittsburgh etc. R. Co. v. Long Island L. & T. Co., 172 U. S. 493, 43 **L. Ed.** 528, 19 Sup. Ct. 238; Central Nat. Bank v. Stevens, 171 U. S. 109, 43 **L. Ed.** 97, 18 Sup. Ct. 837; Crescent City Live Stock Co. v. Butcher's Union Slaughter House Co., 120 U. S. 141, 30 **L. Ed.** 614, 7 Sup. Ct. 472; Palmer v. Hussey, 119 U. S. 96, 30 **L. Ed.** 362, 7 Sup. Ct. 158.

[20] Embry v. Palmer, 107 U. S. 3, 27 **L. Ed.** 346, 2 Sup. Ct. 25.

§ 1606. Decisions Involving the Validity of State Statutes Whose Authority Drawn in Question as Repugnant to the Federal Constitution, Laws, or Treaties. It is only the statute of a *state* which can be re-examined under this clause,[21] and a statute of a territory is not a statute of a state, nor is it an act of Congress, nor a statute of the United States, within the meaning of this section, and consequently the decision of the state courts, that the law of a territory is not repugnant to the Constitution of the United States, is not reviewable.[22]

In considering this clause, it is necessary, as it was in considering the preceding one, to determine when the validity of a treaty, statute, or authority is "drawn in question." In order to give the Supreme Court jurisdiction to review a judgment rendered by the highest court of this state in favor of the validity of a statute or an authority exercised under a state, the validity of the statute or authority must have been drawn in question upon the ground of their being repugnant to the Constitution, laws, or treaties of the United States. When no such ground has been presented to or considered by the courts of the state, it cannot be said that those courts have disregarded the Constitution of the United States, and the Supreme Court has no jurisdiction.[23] Whether or not the Constitution of a state is violated by state law is not within the scope of this clause.[24] Nor is the question of the correct construc-

[21] Scott v. Jones, 5 How. 343, 12 **L. Ed.** 181.

[22] Messenger v. Mason, 10 Wall. 507, 19 **L. Ed.** 1028; Miners' Bank v. Iowa, 12 How. 1, 13 **L. Ed.** 867.

[23] Scudder v. Coler, 175 U. S. 32, 44 **L. Ed.** 62, 20 Sup. Ct. 26; Columbia Water Power Co. v. Columbia Elec. Street R. R. Co., 172 U. S. 475, 43 **L. Ed.** 521, 19 Sup. Ct. 247 (cases therein cited); Miller v. Cornwall R. Co., 168 U. S. 131, 42 **L. Ed.** 409, 18 Sup. Ct. 34; Levy v. Superior Court, 167 U. S. 175, 42 **L. Ed.** 126, 17 Sup. Ct. 769; Adams v. Preston, 22 How. 473, 16 **L. Ed.** 273; Murdock v. Memphis, 20 Wall. (U. S.) 590, 22 **L. Ed.** 429; Michigan Central R. R. Co. v. Michigan Southern R. R. Co., 19 How. 378, 15 **L. Ed.** 689.

[24] Calder v. Bull, 3 Dall. 386, 1 **L. Ed.** 648; Jackson v. Lamphire, 3 Pet. 280, 7 **L. Ed.** 679; Withers v. Buckley, 20 How. 84, 15 **L. Ed.** 816; Congdon & Tenn. Mining Co. v. Goodman, 2 Black, 574, 17 **L. Ed.** 257; Solomons v. Graham, 15 Wall. 208, 21 **L. Ed.** 37; Leeper v. Texas, 139 U. S. 462, 35 **L. Ed.** 225, 11 Sup. Ct. 577; Murray v. Louisiana, 163 U. S. 101, 41 **L. Ed.** 87, 16 Sup. Ct. 990; East Hartford v. Hartford Bridge Co., 10 How. 511, 13 **L. Ed.** 518; Baldwin v. Kansas, 129 U. S. 52, 32 **L. Ed.** 640, 9 Sup. Ct. 193; Missouri v. Harris, 144 U. S. 210, 36 **L. Ed.** 407, 12 Sup. Ct. 838; Sage v. Louisiana Board of Liquidation, 144 U. S. 647, 36 **L. Ed.** 577, 12 Sup. Ct. 755; Powell v. Brunswick County Supervisors, 150 U. S. 433, 37 **L. Ed.**

tion of a state law, when its validity is admitted.[25] Formerly the decision in the state court must have been *in favor* of the validity of the statute of or the authority exercised under the statutes drawn in question.[26] But the amendment of 1916 has changed this so that a decision either for or against is reviewable. It is not necessary that the state law be either in the form of a statute enacted by the legislature of the state or in the form of a Constitution established by people of the state; a by-law or ordinance of a municipal corporation may be such an exercise of legislative power that it may be properly considered as a law within the meaning of this clause of the section.[27]

§ 1607. Decisions for or Against Right, Title, Privilege, or Immunity Claimed Under United States Constitution, Treaty, Statute, Authority, or Commission. To give the Supreme Court jurisdiction in this class of cases the right, title, or immunity which is denied by the decisions of the state court must grow out of the Constitution or a treaty or statute of the United States which has been relied upon.[28]

The title, right, privilege, or immunity claimed under the Constitution or treaty or statute of or commission held under the United States, with possibly some rare exceptions, must be spe-

1134, 14 Sup. Ct. 166; In re Kemmler, 136 U. S. 436, 34 **L. Ed.** 519, 10 Sup. Ct. 930; McElvaine v. Brush, 142 U. S. 155, 35 **L. Ed.** 971, 12 Sup. Ct. 156.

[25] Congdon & Tenn. Mining Co. v. Goodman, 2 Black, 574, 17 **L. Ed.** 257; Scott v. Jones, 5 How. 343, 12 **L. Ed.** 181; Lessiuer v. Price, 12 How. 59, 13 **L. Ed.** 893; Commercial Bank v. Buckingham, 5 How. 317, 12 **L. Ed.** 169; Smith v. Hunter, 7 How. 738, 12 **L. Ed.** 894; Grand Gulf R. Co. v. Marshall, 12 How. 165, 13 **L. Ed.** 938; Ferry v. King County, 141 U. S. 668, 35 **L. Ed.** 895, 12 Sup. Ct. 128; Snell v. Chicago, 152 U. S. 191, 38 **L. Ed.** 408, 14 Sup. Ct. 489.

[26] McKinney v. Carroll, 12 Pet. 66, 9 **L. Ed.** 1002; Commonwealth Bank v. Griffith, 14 Pet. 56, 10 **L. Ed.** 352; Walker v. Taylor, 5 How. 64, 12 **L. Ed.** 52.

[27] Bacon v. Texas, 163 U. S. 207, 41 **L. Ed.** 132, 16 Sup. Ct. 1023; New Orleans Water Works Co. v. Louisiana Sugar Refining Co., 125 U. S. 18, 31 **L. Ed.** 607, 8 Sup. Ct. 741.

[28] Miller v. Lancaster Bank, 106 U. S. 542, 27 **L. Ed.** 289, 1 Sup. Ct. 536; Long v. Converse, 91 U. S. 105, 23 **L. Ed.** 233; Hale v. Gaines, 22 How. 160, 16 **L. Ed.** 269; Wynn v. Morris, 20 How. 5, 15 **L. Ed.** 800; Henderson v. Tennessee, 10 How. 323, 13 **L. Ed.** 439; Verden v. Coleman, 1 Black, 472, 17 **L. Ed.** 161; Montgomery v. Hernandez, 12 Wheat. 129, 6 **L. Ed.** 575.

cially set up or claimed in the court below in order to vest the Supreme Court with jurisdiction.[29] An exception to this rule is found in a case where the validity of a treaty or statute of the United States is raised and a decision is against it, or where the validity of a state statute is drawn in question and the decision is in favor of its validity. In such cases the federal question need not be specifically set up if it appears in the record, was decided and such decision was necessarily involved in the case so that it could not have been determined without deciding such question.[30]

Ordinarily, however, the right, title, privilege, or immunity relied upon must not only be specially set up or claimed, but it must be so claimed or set up at the proper time and in the proper

[29] Home for Incurables v. New York, 187 U. S. 155, 63 **L. R. A.** 329, 47 **L. Ed.** 117, 23 Sup. Ct. 84; Bolln v. Nebraska, 176 U. S. 83, 44 **L. Ed.** 382, 20 **Sup. Ct.** 287; Telluride Power Transmission Co. v. Rio Grande Western Railway Co., 175 U. S. 639, 44 **L. Ed.** 305, 20 Sup. Ct. 245; Columbia Water Power Co. v. Columbia Electric Street Railway Co., 172 U. S. 475, 43 **L. Ed.** 521, 19 Sup. Ct. 247; Levy v. Superior Court, 167 U. S. 175, 42 **L. Ed.** 126, 17 Sup. Ct. 769; Oxley Stave Co. v. Butler Co., 166 U. S. 648, 41 **L. Ed.** 1149, 17 Sup. Ct. 709; Chicago etc. R. Co. v. Chicago, 164 U. S. 454, 41 **L. Ed.** 511, 17 Sup. Ct. 129; Powell v. Brunswick County Supervisors, 150 U. S. 433, 37 **L. Ed.** 1134, 14 Sup. Ct. 166; Roby v. Colehour, 146 U. S. 153, 36 **L. Ed.** 922, 13 Sup. Ct. 47; Leeper v. Texas, 139 U. S. 462, 35 **L. Ed.** 225, 11 Sup. Ct. 577; Baldwin v. Kansas, 129 U. S. 52, 32 **L. Ed.** 640, 9 Sup. Ct. 193; Chappell v. Bradshaw, 128 U. S. 132, 32 **L. Ed.** 369, 9 Sup. Ct. 40; French v. Hopkins, 124 U. S. 524, 31 **L. Ed.** 536, 8 Sup. Ct. 589; Spies v. Illinois, 123 U. S. 131, 31 **L. Ed.** 80, 8 Sup. Ct. 21; Armstrong v. Athens County, 16 Pet. 281, 10 **L. Ed.** 965; Mississippi & Missouri R. Co. v. Rock, 4 Wall. 177, 18 **L. Ed.** 381.

[30] Miller v. Nicholls, 4 Wheat. 311, 4 **L. Ed.** 578; Willson v. Blackbird Creek Marsh Co., 2 Pet. 245, 7 **L. Ed.** 412; Satterlee v. Mathewson, 2 Pet. 380, 7 **L. Ed.** 458; Fisher v. Cockerell, 5 Pet. 248, 8 **L. Ed.** 114; Crowell v. Randell, 10 Pet. 368, 9 **L. Ed.** 458; Harris v. Dennie, 3 Pet. 292, 7 **L. Ed.** 683; Farney v. Towle, 1 Black, 350, 17 **L. Ed.** 216; Hoyt v. Sheldon, 1 Black, 518, 17 **L. Ed.** 65; Mississippi & Missouri etc. R. Co. v. Rock, 4 Wall. 177, 18 **L. Ed.** 381; Furman v. Nichol, 8 Wall. 44, 19 **L. Ed.** 370; Columbia Water Power Co. v. Columbia Elec. St. R. R. Co., 172 U. S. 475, 43 **L. Ed.** 521, 19 Sup. Ct. 247; Kaukauna Water Power Co. v. Green Bay etc. Canal Co., 142 U. S. 254, 35 **L. Ed.** 1004, 12 Sup. Ct. 173; Hickie v. Starke, 1 Pet. 94, 7 **L. Ed.** 67; Bridge Proprs. v. Hoboken Land Co., 1 Wall. 116, 17 **L. Ed.** 571; Yazoo & M. V. R. Co. v. Adams, 180 U. S. 1, 45 **L. Ed.** 395, 21 Sup. Ct. 240; Telluride Power Transmission Co. v. Rio Grande Western Railway Co., 175 U. S. 639, 44 **L. Ed.** 305, 20 Sup. Ct. 245; Green Bay etc. Canal Co. v. Patten Paper Co., 172 U. S. 58, 43 **L. Ed.** 364, 19 Sup. Ct. 97; Chicago etc. R. R. Co. v. Chicago, 166 U. S. 226, 41 **L. Ed.** 979, 17 Sup. Ct. 581; Sayward v. Denny, 158 U. S. 180, 39 **L. Ed.** 941, 15 Sup. Ct. 777; Powell v. Brunswick County Supervisors, 150 U. S. 440, 37 **L. Ed.** 1134, 14 Sup. Ct. 166; Davis v. Packard, 6 Pet. 41, 8 **L. Ed.** 312.

manner.[31] The question must be raised in the state court by the individual who seeks to have it reviewed in the Supreme Court. The fact that someone else has raised it in the state court is of no avail to the appellant or plaintiff in error, if he himself fail to raise it in the court below.[32] Moreover the right, title, privilege, or immunity must be personal to the appellant or plaintiff in error.[33] A state officer, testing the constitutionality of a state law solely in the interest of third persons, has no standing to review the judgment, even though a judgment for costs was rendered against him personally.[34] "The proper time to present the question is in the trial court whenever that is required by state practice in accordance with which the highest court of a state will not revise the judgment of the court below on questions not therein raised."[35] And if it is not presented before decision by the court

[31] Mutual Life Ins. Co. v. McGrew, 188 U. S. 292, 63 **L. R. A.** 33, 47 **L. Ed.** 480, 23 Sup. Ct. 375; Sayward v. Denney, 158 U. S. 180, 39 **L. Ed.** 941, 15 Sup. Ct. 777; Morrison v. Watson, 154 U. S. 111, 38 **L. Ed.** 927, 14 Sup. Ct. 995; Miller v. Texas, 153 U. S. 535, 38 **L. Ed.** 812, 14 Sup. Ct. 874; Maxwell v. Newbold, 18 How. 515, 15 **L. Ed.** 508; Hoyt v. Sheldon, 1 Black, 518, 17 **L. Ed.** 65.

[32] De Lamar's Nevada Gold Mining Co. v. Nesbitt, 177 U. S. 523, 44 **L. Ed.** 872, 20 Sup. Ct. 715; Texas etc. R. Co. v. Johnson, 151 U. S. 81, 38 **L. Ed.** 81, 14 Sup. Ct. 250; Missouri v. Andriano, 138 U. S. 496, 34 **L. Ed.** 1012, 11 Sup. Ct. 385; Linton v. Stanton, 12 How. 423, 13 **L. Ed.** 1050; Strader v. Baldwin, 9 How. 261, 13 **L. Ed.** 130; Manning v. French, 133 U. S. 186, 33 **L. Ed.** 582, 10 Sup. Ct. 258; McNulta v. Lochridge, 141 U. S. 327, 35 **L. Ed.** 796, 12 Sup. Ct. 11; Kizer v. Texarkana etc. R. R. Co., 179 U. S. 199, 45 **L. Ed.** 152, 21 Sup. Ct. 100; Conde v. York, 168 U. S. 642, 42 **L. Ed.** 611, 18 Sup. Ct. 234; Northern P. R. Co. v. Patterson, 154 U. S. 130, 38 **L. Ed.** 934, 14 Sup. Ct. 977; Ludeling v. Chaffe, 143 U. S. 301, 36 **L. Ed.** 313, 12 Sup. Ct. 439; Giles v. Little, 134 U. S. 645, 33 **L. Ed.** 1062, 10 Sup. Ct. 623; Miller v. Lancaster Nat. Bank, 106 U. S. 542, 27 **L. Ed.** 289, 1 Sup. Ct. 536; Long v. Converse, 91 U. S. 105, 23 **L. Ed.** 233; Owings v. Norwood, 5 Cranch, 344, 3 **L. Ed.** 120; Montgomery v. Hernandez, 12 Wheat. 129, 6 **L. Ed.** 575; Hale v. Gaines, 22 How. 144, 16 **L. Ed.** 264; Verden v. Coleman, 1 Black, 472, 17 **L. Ed.** 161; Sully v. American National Bank, 178 U. S. 289, 44 **L. Ed.** 1072, 20 Sup. Ct. 935; Smith v. Indiana, 191 U. S. 138, 48 **L. Ed.** 125, 24 Sup. Ct. 51.

[33] *Ibid.*

[34] Smith v. Indiana, 191 U. S. 138, 48 **L. Ed.** 125, 24 Sup. Ct. 51.

[35] Spies v. Illinois, 123 U. S. 131, 31 **L. Ed.** 80, 8 Sup. Ct. 21; see also Jacobi v. Alabama, 187 U. S. 133, 47 **L. Ed.** 106, 23 Sup. Ct. 48; Layton v. Missouri, 187 U. S. 356, 47 **L. Ed.** 214, 23 Sup. Ct. 137; Erie R. R. Co. v. Purdy, 185 U. S. 148, 46 **L. Ed.** 847, 22 Sup. Ct. 605; Mutual Life Ins. Co. v. McGrew, 188 U. S. 308, 47 **L. Ed.** 480, 23 Sup. Ct. 375, 63 **L. R. A.** 33; Baldwin v. Kansas, 129 U. S. 52, 32 **L. Ed.** 640, 9 Sup. Ct. 193.

of last resort in the state, it then becomes too late to present it.[36] It is not sufficient, therefore, to make the claim for the first time in the petition for writ of error;[37] or in a petition for rehearing after judgment,[38] except in a case where the highest state court has entertained a petition for rehearing, containing federal questions, and has decided them.[39]

The proper manner in which to raise the question is by motion, exception, pleading, or any other action which asserts the right, title, privilege or immunity positively and unmistakably upon

[36] Bolln v. Nebraska, 176 U. S. 83, 44 **L. Ed.** 382, 20 Sup. Ct. 287; Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 43 **L. Ed.** 840, 19 Sup. Ct. 571; Winona etc. Land Co. v. Minnesota, 159 U. S. 540, 40 **L. Ed.** 252, 16 Sup. Ct. 88.

[37] Sayward v. Denny, 158 U. S. 180, 39 **L. Ed.** 941, 15 Sup. Ct. 777; Morrison v. Watson, 154 U. S. 111, 38 **L. Ed.** 927, 14 Sup. Ct. 995; Miller v. Texas, 153 U. S. 535, 38 **L. Ed.** 812, 14 Sup. Ct. 874; Duncan v. Missouri, 152 U. S. 377, 38 **L. Ed.** 485, 14 Sup. Ct. 570; Powell v. Brunswick County Supervisors, 150 U. S. 433, 37 **L. Ed.** 1134, 14 Sup. Ct. 166; Schuyler Nat. Bank v. Bollong, 150 U. S. 85, 37 **L. Ed.** 1008, 14 Sup. Ct. 24; Loeber v. Schroeder, 149 U. S. 580, 37 **L. Ed.** 856, 13 Sup. Ct. 934; Brown v. Massachusetts, 144 U. S. 573, 36 **L. Ed.** 546, 12 Sup. Ct. 757; Butler v. Gage, 138 U. S. 52, 34 **L. Ed.** 869, 11 Sup. Ct. 235; Chappell v. Bradshaw, 128 U. S. 132, 32 **L. Ed.** 369, 9 Sup. Ct. 40; Brooks v. Missouri, 124 U. S. 394, 31 **L. Ed.** 454, 8 Sup. Ct. 443; Spies v. Illinois, 123 U. S. 131, 31 **L. Ed.** 80, 8 Sup. Ct. 21.

[38] Johnson v. New York L. Ins. Co., 187 U. S. 496, 47 **L. Ed.** 273, 23 Sup. Ct. 194; Simmerman v. Nebraska, 116 U. S. 54, 29 **L. Ed.** 535, 6 Sup. Ct. 333; Santa Cruz County v. Santa Cruz R. Co., 111 U. S. 361, 28 **L. Ed.** 456, 4 Sup. Ct. 474; Meyer v. Richmond, 172 U. S. 82, 43 **L. Ed.** 374, 19 Sup. Ct. 106; Winona etc. R. Co. v. Plainview, 143 U. S. 371, 36 **L. Ed.** 191, 12 Sup. Ct. 530; Worthy v. Barrett, 9 Wall. 611, 19 **L. Ed.** 565; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 63 **L. R. A.** 33, 47 **L. Ed.** 480, 23 Sup. Ct. 375; Turner v. Richardson, 180 U. S. 92, 45 **L. Ed.** 438, 21 Sup. Ct. 295; Capital Nat. Bank v. Cadiz First Nat. Bank, 172 U. S. 425, 43 **L. Ed.** 502, 19 Sup. Ct. 202; Meyer v. Richmond, 172 U. S. 82, 43 **L. Ed.** 374, 19 Sup. Ct. 106; Miller v. Cornwall R. Co., 168 U. S. 131, 42 **L. Ed.** 409, 18 Sup. Ct. 34; Zadig v. Baldwin, 166 U. S. 488, 41 **L. Ed.** 1087, 17 Sup. Ct. 639; Pim v. St. Louis, 165 U. S. 273, 41 **L. Ed.** 714, 17 Sup. Ct. 322; Sayward v. Denny, 158 U. S. 180, 39 **L. Ed.** 941, 15 Sup. Ct. 777; Loeber v. Schroeder, 149 U. S. 580, 37 **L. Ed.** 856, 13 Sup. Ct. 934; Bushnell v. Crooke Min. etc. Co., 148 U. S. 682, 37 **L. Ed.** 610, 13 Sup. Ct. 771; Winona etc. R. Co. v. Plainview, 143 U. S. 371, 36 **L. Ed.** 191, 12 Sup. Ct. 530; Leeper v. Texas, 139 U. S. 462, 35 **L. Ed.** 225, 11 Sup. Ct. 577; Butler v. Gage, 138 U. S. 52, 34 **L. Ed.** 869, 11 Sup. Ct. 235; Texas etc. R. Co. v. Southern Pac. R. Co., 137 U. S. 48, 34 **L. Ed.** 614, 11 Sup. Ct. 10; Susquehanna Boom Co. v. West Branch Boom Co., 110 U. S. 57, 28 **L. Ed.** 69, 3 Sup. Ct. 438.

[39] Mallett v. North Carolina, 181 U. S. 589, 45 **L. Ed.** 1015, 21 Sup. Ct. 730; Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 63 **L. R. A.** 33, 47 **L. Ed.** 480, 23 Sup. Ct. 375; Leigh v. Green, 193 U. S. 79, 48 **L. Ed.** 623, 24 Sup. Ct. 390.

the record.[40] No particular form of words or phrases has ever been declared necessary, and all that is required is that the assertion of the rights be brought clearly to the attention of the court.[41] But the fact that it was so called to the court's attention and that it was decided or that its decision was necessary to the judgment or decree rendered in the case must appear upon the face of the record[42] either expressly or by necessary implica-

[40] Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 **L. Ed.** 1149, 17 Sup. Ct. 709; Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 63 **L. E. A.** 33, 47 **L. Ed.** 480, 23 Sup. Ct. 375; Kipley v. Illinois, 170 U. S. 182, 42 **L. Ed.** 998, 18 Sup. Ct. 550; Levy v. Superior Court, 167 U. S. 175, 177, 42 **L. Ed.** 126, 17 Sup. Ct. 769; Dewey v. Des Moines, 173 U. S. 193, 43 **L. Ed.** 665, 19 Sup. Ct. 379; Bolln v. Nebraska, 176 U. S. 83, 44 **L. Ed.** 382, 20 Sup. Ct. 287; Winona etc. Land Co. v. Minnesota, 159 U. S. 540, 40 **L. Ed.** 252, 16 Sup. Ct. 88; Michigan Sugar Co. v. Michigan, 185 U. S. 112, 46 **L. Ed.** 829, 22 Sup. Ct. 581; New York Central R. R. Co. v. New York, 186 U. S. 269, 46 **L. Ed.** 1158, 22 Sup. Ct. 916; Chapin v. Fye, 179 U. S. 127, 45 **L. Ed.** 119, 21 Sup. Ct. 71; De Lamar's Nev. Gold Mining Co. v. Nesbitt, 177 U. S. 523, 44 **L. Ed.** 872, 20 Sup. Ct. 715; Keokuk & H. Bridge Co. v. Illinois, 175 U. S. 626, 44 **L. Ed.** 299, 20 Sup. Ct. 205; Miller v. Cornwall R. Co., 168 U. S. 131, 42 **L. Ed.** 409, 18 Sup. Ct. 34; Porter v. Foley, 24 How. 415, 16 **L. Ed.** 740; Maxwell v. Newbold, 18 How. 511, 15 **L. Ed.** 506; Lawler v. Walker, 14 How. 149, 14 **L. Ed.** 364; Hoyt v. Sheldon, 1 Black, 518, 17 **L. Ed.** 65; Edwards v. Elliott, 21 Wall. 532, 22 **L. Ed.** 487; Messenger v. Mason, 10 Wall. 507, 19 **L. Ed.** 1028; Erie R. R. Co. v. Purdy, 185 U. S. 148, 46 **L. Ed.** 847, 22 Sup. Ct. 605.

[41] Green Bay etc. Canal Co. v. Patten Paper Co., 172 U. S. 58, 43 **L. Ed.** 364, 19 Sup. Ct. 97; Carter v. Texas, 177 U. S. 442, 44 **L. Ed.** 839, 20 Sup. Ct. 687; Erie R. R. Co. v. Purdy, 185 U. S. 148, 46 **L. Ed.** 847, 22 Sup. Ct. 605.

[42] Citizens Sav. Bank v. Owensboro, 173 U. S. 636, 43 **L. Ed.** 840, 19 Sup. Ct. 530; Dewey v. Des Moines, 173 U. S. 193, 43 **L. Ed.** 665, 19 Sup. Ct. 379; Capital Nat. Bank v. Cadiz First Nat. Bank, 172 U. S. 425, 43 **L. Ed.** 502, 19 Sup. Ct. 202; Green Bay etc. Canal Co. v. Patten Paper Co., 172 U. S. 58, 43 **L. Ed.** 364, 19 Sup. Ct. 97; Kipley v. Illinois, 170 U. S. 182, 42 **L. Ed.** 998, 18 Sup. Ct. 550; Miller v. Cornwall R. Co., 168 U. S. 131, 42 **L. Ed.** 409, 18 Sup. Ct. 34; Louisville etc. R. Co. v. Louisville, 166 U. S. 709, 41 **L. Ed.** 1173, 17 Sup. Ct. 725; Dibble v. Bellingham Bay Land Co., 163 U. S. 63, 41 **L. Ed.** 72, 16 Sup. Ct. 939; Chemical Nat. Bank v. City Bank, 160 U. S. 646, 40 **L. Ed.** 568, 16 Sup. Ct. 417; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 540, 40 **L. Ed.** 252, 16 Sup. Ct. 88; Goodenough Horseshoe Mfg. Co. v. Rhode I. Horseshoe Co., 154 U. S. 635, 24 **L. Ed.** 368, 14 Sup. Ct. 1180; Gray v. Coan, 154 U. S. 589, 38 **L. Ed.** 1088, 14 Sup. Ct. 1168; Morrison v. Watson, 154 U. S. 111, 38 **L. Ed.** 927, 14 Sup. Ct. 995; Miller v. Texas, 153 U. S. 535, 38 **L. Ed.** 812, 14 Sup. Ct. 874; Marsh v. Nichols, 140 U. S. 344, 35 **L. Ed.** 413, 11 Sup. Ct. 798; Murray v. Charlestown, 96 U. S. 432, 24 **L. Ed.** 760; Wolf v. Stix, 96 U. S. 541, 24 **L. Ed.** 640; Suydam v. Williamson, 20 How. 427, 15 **L. Ed.** 978; Christ Church v. Phil. Co., 20 How. 26, 15 **L. Ed.** 802; Carter v. Bennett, 15 How. 354, 14 **L. Ed.** 727; Ocean Ins. Co. v. Polleys, 13 Pet. 157, 10 **L. Ed.** 105; Crowell v. Randell, 10 Pet. 368, 9 **L. Ed.** 458; Davis v. Parkard, 7 Pet. 276, 8 **L. Ed.** 684; Satterlee v. Matthewson, 2 Pet. 380, 7 **L. Ed.** 458; Miller v. Nicholls, 4

tion.[43] In this connection, note that a certificate of a chief justice of the highest court of a state, that certain federal questions were presented and passed upon, is not a part of the record, its office being merely to make more certain that which is too indefinite in the record, and it is insufficient, in itself, to give the Supreme Court jurisdiction.[44]

To authorize a review of this class of cases as of the preceding classes, the decision formerly must have been *adverse* to a title, right, privilege, or immunity claimed by the plaintiff in error.[45] The amendment of 1916 now permits review of decisions in favor of federal claims.

Wheat. 311, 4 **L. Ed.** 578; The Victory, 6 Wall. 382, 18 **L. Ed.** 848; Sayward v. Denny, 158 U. S. 180, 39 **L. Ed.** 941, 15 Sup. Ct. 777; Choteau v. Marguerite, 12 Pet. 507, 9 **L. Ed.** 1174; Coons v. Gallaher, 15 Pet. 18, 10 **L. Ed.** 645; Commercial Bank v. Buckingham, 5 How. 317, 12 **L. Ed.** 169; Grand Gulf R. & Banking Co. v. Marshall, 12 How. 165, 13 **L. Ed.** 938; Maxwell v. Newbold, 18 How. 511, 15 **L. Ed.** 506; Hoyt v. Sheldon, 1 Black, 518, 17 **L. Ed.** 65; Taylor v. Morton, 2 Black, 481, 17 **L. Ed.** 277; Gibson v. Chouteau, 8 Wall. 314, 19 **L. Ed.** 317; Cockroft v. Vose, 14 Wall. 5, 20 **L. Ed.** 875; Detroit City R. Co. v. Guthard, 114 U. S. 133, 29 **L. Ed.** 118, 5 Sup. Ct. 811; Kansas Endowment Assn. v. Kansas, 120 U. S. 103, 30 **L. Ed.** 593, 7 Sup. Ct. 499; Nauer v. Thomas, 13 Allen (Mass.), 572; Inglee v. Coolidge, 2 Wheat. 363, 4 **L. Ed.** 261; Fisher v. Cockerell, 5 Pet. 248, 8 **L. Ed.** 114; Crawford v. Branch Bank, 7 How. 279, 12 **L. Ed.** 700; Attorney-General v. Federal Street Meeting House, 1 Black, 262, 17 **L. Ed.** 61; Parmelee v. Lawrence, 11 Wall. 36, 20 **L. Ed.** 48; Brooks v. Missouri, 124 U. S. 394, 31 **L. Ed.** 454, 8 Sup. Ct. 443; Powell v. Brunswick County Supervisors, 150 U. S. 433, 37 **L. Ed.** 1134, 14 Sup. Ct. 166; Ansbro v. United States, 159 U. S. 695, 40 **L. Ed.** 310, 16 Sup. Ct. 187; Murdock v. Memphis, 20 Wall. 636, 22 **L. Ed.** 444; Ware v. Galveston City Co., 111 U. S. 170, 28 **L. Ed.** 393, 4 Sup. Ct. 337.

[43] Craig v. Missouri, 4 Pet. 410, 7 **L. Ed.** 903; Powell v. Brunswick County Supervisors, 150 U. S. 433, 37 **L. Ed.** 1134, 14 Sup. Ct. 166; Sayward v. Denny, 158 U. S. 180, 39 **L. Ed.** 941, 15 Sup. Ct. 777.

[44] Home for Incurables v. New York, 187 U. S. 155, 63 **L. R. A.** 329, 47 **L. Ed.** 117, 23 Sup. Ct. 84; Yazoo & M. V. R. R. Co. v. Adams, 180 U. S. 41, 45 **L. Ed.** 415, 21 Sup. Ct. 256; Henkel v. Cincinnati, 177 U. S. 170, 44 **L. Ed.** 720, 20 Sup. Ct. 573; Dibble v. Bellingham Bay Land Co., 163 U. S. 63, 41 **L. Ed.** 72, 16 Sup. Ct. 939; Sayward v. Denny, 158 U. S. 180, 39 **L. Ed.** 941, 15 Sup. Ct. 777; Newport Light Co. v. Newport, 151 U. S. 527, 38 **L. Ed.** 259, 14 Sup. Ct. 429; Powell v. Brunswick County Supervisors, 150 U. S. 433, 37 **L. Ed.** 1134, 14 Sup. Ct. 166; Roby v. Colehour, 146 U. S. 153, 36 **L. Ed.** 922, 13 Sup. Ct. 47; Felix v. Scharnweber, 125 U. S. 54, 31 **L. Ed.** 687, 8 Sup. Ct. 759; Caperton v. Bowyer, 14 Wall. 216, 20 **L. Ed.** 882; Lawler v. Walker, 14 How. 149, 14 **L. Ed.** 364; Parmelee v. Lawrence, 11 Wall. 36, 20 **L. Ed.** 48; Messenger v. Mason, 10 Wall. 507, 19 **L. Ed.** 1028.

[45] De Lamar's Nev. Gold Min. Co. v. Nesbitt, 177 U. S. 523, 44 **L. Ed.** 872, 20 Sup. Ct. 715; Rae v. Homestead Loan etc. Co., 176 U. S. 121, 44 **L. Ed.** 398, 20 Sup. Ct. 341; Abbott v. Tacoma Bank of Commerce, 175 U. S. 409, 44 **L. Ed.** 217, 20 Sup. Ct. 153; Jersey City etc. Power Co. v. Morgan, 160 U. S. 288, 40 **L. Ed.** 430, 16 Sup. Ct. 276; Sayward v. Denny,

§ 1608. General Propositions Flowing from § 237, Judicial Code. Having discussed each of the three classes of cases reviewable by writ of error under § 237, Judicial Code, there still remain certain general rules or propositions applicable to the section as a whole, which are briefly as follows:

1. It is not necessary that any particular amount of money be involved in order to entitle the plaintiff in error to a review.[46]

2. The section applies alike to criminal and civil cases either in law or in equity.[47]

3. Federal question must be real, not fictitious; that is, there must be some ground for the averment of the question.[48]

4. Questions of fact cannot be reviewed by the Supreme Court, but must be taken as found.[49]

5. "If it appears that the judgment of the state court was correct, the jurisdiction does not attach regardless of the presence of a federal question."[50]

158 U. S. 180, 39 **L. Ed.** 941, 15 Sup. Ct. 777; Dower v. Richards, 151 U. S. 658, 38 **L. Ed.** 305, 14 Sup. Ct. 452, 17 Mor. Min. Rep. 704; Tyler v. Cass Co., 142 U. S. 288, 35 **L. Ed.** 1016, 12 Sup. Ct. 225; Gordon v. Caldcleugh, 3 Cranch, 268, 2 **L. Ed.** 436; Buel v. Van Ness, 8 Wheat. 312, 5 **L. Ed.** 624; Fulton v. McAffee, 16 Pet. 149, 10 **L. Ed.** 918; Ocean Ins. Co. v. Polleys, 13 Pet. 157, 10 **L. Ed.** 105; Ross v. Doe, 1 Pet. 655, 7 **L. Ed.** 302; Hale v. Gaines, 22 How. 144, 16 **L. Ed.** 264; Nelson v. Moloney, 174 U. S. 164, 43 **L. Ed.** 934, 19 Sup. Ct. 622; Missouri Pacific Ry. Co. v. Fitzgerald, 160 U. S. 556, 40 **L. Ed.** 536, 16 Sup. Ct. 389.

[46] Weston v. Charleston, 2 Pet. 449, 7 **L. Ed.** 481; Holmes v. Jennison, 14 Pet. 540, 10 **L. Ed.** 579; The Paquete Habana, 175 U. S. 682, 44 **L. Ed.** 320, 20 Sup. Ct. 290. As to amount and value as an element of Supreme Court's appellate jurisdiction and history of changes therein, see Kirby v. America Soda Fountain Co., 194 U. S. 144, 48 **L. Ed.** 911, 24 Sup. Ct. 619.

[47] Cohens v. Virginia, 6 Wheat. 264, 6 **L. Ed.** 257; Verden v. Coleman, 22 How. 192, 16 **L. Ed.** 336; Dower v. Richards, 151 U. S. 658, 38 **L. Ed.** 305, 14 Sup. Ct. 452, 17 Mor. Min. Rep. 704.

[48] Hamblin v. Western Land Co., 147 U. S. 531, 37 **L. Ed.** 267, 13 Sup. Ct. 353. See also Millingar v. Hartupee, 6 Wall. 258, 18 **L. Ed.** 829; New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 35 **L. Ed.** 943, 12 Sup. Ct. 142; Wilson v. North Carolina, 169 U. S. 586, 42 **L. Ed.** 865, 18 Sup. Ct. 435; St. Louis etc. R. Co. v. Missouri, 156 U. S. 478, 39 **L. Ed.** 502, 15 Sup. Ct. 443.

[49] Hedrick v. Atchison etc. R. Co., 167 U. S. 673, 42 **L. Ed.** 320, 17 Sup. Ct. 922; Atchison etc. R. Co. v. Matthews, 174 U. S. 96, 43 **L. Ed.** 909, 19 Sup. Ct. 609; Backus v. Fort St. Union Depot Co., 169 U. S. 557, 42 **L. Ed.** 853, 18 Sup. Ct. 445; Egan v. Hart, 165 U. S. 188, 41 **L. Ed.** 680, 17 Sup. Ct. 300; In re Buchanan, 158 U. S. 31, 39 **L. Ed.** 884, 15 Sup. Ct. 723; Chicago etc. R. Co. v. Chicago, 166 U. S. 226, 41 **L. Ed.** 979, 17 Sup. Ct. 581; Missouri etc. R. Co. v. Haber, 169 U. S. 613, 42 **L. Ed.** 878, 18 Sup. Ct. 488.

[50] Hammond v. Johnston, 142 U. S. 78, 35 **L. Ed.** 941, 12 Sup. Ct. 141.

The Supreme Court has summarized most of the essential conditions necessary to its jurisdiction to review decisions of state courts under this section, in the early case of Murdock v. Memphis, 20 Wall. 635, where Miller, J., says in the opinion:

"We hold the following propositions on this subject as flowing from the statute as it now stands:

"That it is essential to the jurisdiction of this court over the judgment of a state court that it shall appear that one of the questions mentioned in the act (now § 237, Judicial Code) must have been raised and presented to the state court.

"That it must have been decided by the state court, or that its decision was necessary to the judgment or decree rendered in the case.

"That the decision must have been *against* the right, claimed or asserted by the plaintiff in error under the Constitution, treaties, laws, or authority of the United States. (This is now changed by the amendment of 1916.)

"These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the state court.

"If it finds that it was rightly decided, the judgment must be affirmed.

"If it was erroneously decided against a plaintiff in error (or appellant) then this court must further inquire whether there is any other matter or issue adjudged by the state court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

"But if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the state court of any other matter or issue which is sufficient to maintain the judgment of that court, without regard to the Federal question, then this court will reverse the judgment of the state court, and will either render such judgment here as the state court should have rendered, or remand the case to that court as the circumstances of the case may require."

§ 1609. Procedure on Removal from State Courts of Last Resort.

§ *1003, Rev. Stats.* "Writs of error from the Supreme Court to a state court in cases authorized by law shall be issued in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States." (6 Fed. Stats. Ann., 2d ed., p. 194; 3 U. S. Comp. Stats. 1916, § 1662.)

Thus, it is seen that the procedure on removal of causes from state courts is identical with that upon writ of error from the United States court, the discussion of which is found in chapter 75.

From the nature of the proceeding, however, the forms to be used will differ from those suggested there. The following are suggested as guides:

PETITION FOR WRIT OF ERROR.

To the Honorable —— Chief Justice of the Supreme Court of the United States and to the Associate Justices of the Court:

——, the plaintiff in the above-entitled cause, shows by this petition to this honorable court, that in the records, proceedings and decisions in the —— court of the state of ——, the same being the highest court of said state in which a decision could be had in this suit, a manifest error has occurred, greatly to the damage of said ——.

That, as appears in the record and proceedings there was drawn in question [here state the federal question particularly involved]; all of which fully appears in the records and proceedings of the case and is specifically set forth in the assignment of errors filed herewith.

Wherefore petitioner prays that a writ of error be allowed, and that a transcript of record, proceedings and papers upon which said decree was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of such court in such cases made and provided, and that the same may be by this honorable court inspected and corrected in accordance with law and justice.

Signed, ——, Solicitor.

WRIT OF ERROR.

The President of the United States to the Honorable Judges of the Supreme Court of the State of ——, Greeting:

Whereas in the record and proceeding and in the rendition of the judgment of the above-entitled cause which is now before you or some of you

between ——, plaintiff, and ——, defendant, your court being the highest court of said state having jurisdiction of the cause, there was drawn in question [here state the federal question involved], and whereas there is manifest error in said decision to the damage of ——, the petitioner in error, and whereas we are willing that if there is error it should be duly corrected, we command you, therefore, if judgment be given therein, that you send under seal of your court, the record and proceedings in said cause to the Supreme Court of the United States together with this writ, within such time as may be necessary in order that you have the same at Washington on the —— day of ——, 19—, that the record may be then inspected by the Supreme Court of the United States to be then and there held in order that justice may be done.

Witness the Honorable ——, Chief Justice of the Supreme Court the —— day of ——, A. D. 19—.

[Seal] ——,

Clerk of the Supreme Court of the United States.

The allowance of the writ may be indorsed upon it as follows: Allowed upon —— giving bond in the sum of —— dollars according to law.

——,

Justice of the Supreme Court of the United States.

Or a separate order of allowance may be made in substantially the following form:

In the Supreme Court of the United States —— Term, ——, 19—.

A. B. v. C. D. } ORDER OF ALLOWANCE OF WRIT OF ERROR.

On this —— day of ——, 19—, the application of A. B., plaintiff in this action, for a writ of error, came on to be heard, said plaintiff being represented by counsel, and it appearing to the court from the petition filed herein and from the record filed therewith that his application should be granted, and that a transcript of the record proceedings and papers, upon which the judgment of the court was rendered properly certified, should be sent to the Supreme Court of the United States, as prayed, in order that such proceedings may be had as may be just.

Now, therefore it is ordered that the writ of error be allowed upon bond being furnished by the plaintiff conditioned according to law in the sum of $—— [if it is desired that this act as a *supersedeas*, insert that provision here], and that a true copy of the record, assignment of errors and all proceedings in the case in the —— court of —— shall be transmitted to the Supreme Court of the United States, duly certified according to law, in order that said court may inspect the same and take such action thereon as it deems proper according to law.

For the bond, citation, assignment of errors, and other papers, the forms given in chapter 75 may be used, the proper title of court and judge or justice being inserted.

The procedure on *certiorari* is the same as from the Circuit Court of Appeals to the Supreme Court. Instructions for *certiorari* proceedings by the clerk of the Supreme Court appear in our Appendix immediately before the Supreme Court Rules.

CHAPTER 75.

APPEAL AND ERROR.

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§ 1650. In General. A judgment at law is carried up for review, not by appeal, but by writ of error. (Porter v. F. M. Davies & Co. (8th Cir.), 223 Fed. 465, 466, 140 C. C. A. 11; Clark v. Belt (8th Cir.), 223 Fed. 573, 579, 138 C. C. A. 1.)

The term "appeal" is reserved exclusively for the designation of proceedings for the review of equity cases; this phraseology is closely adhered to by the federal courts, and an error of law cannot be considered under an appeal,—nor can an equity suit be reviewed by writ of error. (Stevens v. Clark, 62 Fed. 321, 10 C. C. A. 379; Highland Boy Gold Mining Co. v. Strickley, 116 Fed. 852, 54 C. C. A. 186; Francisco v. Chicago & A. R. R. Co., 149 Fed. 359, 9 **Ann. Cas.** 628, 79 C. C. A. 292; Ghost v. United States, 168 Fed. 843, 94 C. C. A. 253; Missouri Pac. R. R. Co. v. Chicago & A. R. R. Co., 132 U. S. 191, 33 **L. Ed.** 309, 10 Sup. Ct. 65.)

The principal distinction between the two methods of review lies in scope of the examination of the appellate court. Only questions of law can be considered upon a writ of error, while an appeal carries up the entire cause, both as to law and fact, for reconsideration.

Writs of error, together with all other preliminary proceedings upon review, either in law or equity, are regulated, not by state

laws, for the conformity act has no application to them, but by federal statutes or rules, or, in their absence, by the common law in case of a review of a law question and by the English chancery practice in reviews of equity cases.

In fact, the statutes governing procedure upon writs of error are, with a very few exceptions, identical with those governing appeals, and the procedure is applicable to and, as a rule, governs, writs of error as well as appeals.

There are four general classes of cases in appellate proceedings:

1. United States district courts to the United States Supreme Court.
2. United States district courts to circuit courts of appeals.
3. Circuit courts of appeals to Supreme Court.
4. State courts to United States Supreme Court.

In addition to these four classes of cases, there is provided a method of review by the Supreme Court in cases where the decision of the circuit courts of appeals is otherwise final (*infra*, chapter 73), by *certiorari* or by certification of questions of law from the circuit court of appeals to the Supreme Court.

Procedure in all four of those general classes is identical, except as to the time within which the appeal must be sued out, and as to differences in practice due to variations in the various rules of different circuits, which should always be examined by the practitioner. These rules will be found in the Appendix, where the corresponding rules of each circuit are grouped together, and where circuit courts of appeals rules are designated by number in this chapter, the compilation in the Appendix is referred to.

Consequently all appellate proceedings are herein treated collectively, except as to time, while proceedings upon *certiorari* or certification of questions of law, are separately treated.

Procedure in the appellate court from courts of Hawaii, Porto Rico, Alaska, Philippines and District of Columbia, falls within one of the four classes enumerated as indicated.

Procedure in the appellate court, after the transcript has been properly filed therein, dismissal of appeals, writ of mandate, and

effect of death on appeals, are separately treated in the latter part of this chapter.

§ 1651. Parties. In case of a joint judgment or decree, all parties who are affected by it must join in the application for appeal or a writ of error, unless some of them, upon being notified by those of their codefendants who desire to sue out the writ or appeal of their intention so to do, refuse to join; in which case the party or parties desiring are entitled to, without such joinder, upon motion stating the facts. But the notice and consequent order permitting the severance of the parties must be incorporated in the record. (Hardee v. Wilson, 146 U. S. 180, 36 **L. Ed.** 933, 13 Sup. Ct. 39; Godbe v. Tootle, 154 U. S. 577, 19 **L. Ed.** 831, 14 Sup. Ct. 1167; Estis v. Trabue, 128 U. S. 229, 32 **L. Ed.** 437, 9 Sup. Ct. 58; Humes v. Third Nat. Bank, 54 Fed. 917, 4 C. C. A. 668.)

This notice and refusal and the order allowing the writ upon motion showing these facts, is known as "Summons and Severance," and is essential to the jurisdiction of the appellate court. But notice in open court at the time when the judgment is rendered, the writ being allowed at that time upon motion, or appeal taken if shown by the record, amounts to summons and severance, and no written notice is then required. (Lamon v. Speer Hardware Co., 190 Fed. 734, 111 C. C. A. 462; Alsop v. Conway, 188 Fed. 572, 110 C. C. A. 366; Ireton v. Pennsylvania Co., 185 Fed. 84, 107 C. C. A. 304; Love v. Export Storage Co., 143 Fed. 1, 74 C. C. A. 155; Loveless v. Ransom, 107 Fed. 627, 46 C. C. A. 515; McNulta v. West Chicago Park, 99 Fed. 328, 39 C. C. A. 545.)

Failure to join all interested parties without having obtained a severance is fatal to the jurisdiction of the appellate court, and the motion for severance must be incorporated in the record in order to vest that court with jurisdiction. This matter may be raised at any time before final disposition of the appeal. (Loveless v. Ransom, 107 Fed. 627, 46 C. C. A. 515.)

It is said in the case of Hardee v. Wilson, 146 U. S. 179, 36 **L. Ed.** 933, 13 Sup. Ct. 39, that there are two reasons for the rule:

(1) That the successful parties may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed; (2) that the appellate tribunal shall not be required to decide a second or third time the same question on the same record.

An exception to this rule exists in a case where one of several defendants affected by a joint decree takes his appeal in open court when the decree is entered. (Detroit v. Guarantee Trust Co., 168 Fed. 611, 93 C. C. A. 604.)

Inasmuch as all parties are then deemed present in court, the allowance of the appeal under these conditions takes the place of summons and severance, and if citation issues, or if other notice is given, it is considered superfluous, any defects being immaterial. (Swift & Co. v. Kortrecht, 110 Fed. 328, 49 C. C. A. 68.)

Ordinarily only a party to the suit is entitled to appeal (Ex parte Cockcroft, 104 U. S. 578, 26 **L. Ed.** 856; In re Woerishoffer, 74 Fed. 916, 21 C. C. A. 175, and cases cited).

But there are cases in which the interest of persons not made parties to the original suit are so affected by the decree that they are entitled to a review. (Davis v. Mercantile Trust Co., 152 U. S. 594, 38 **L. Ed.** 563, 14 Sup. Ct. 693.)

When this is the case, the interest of such persons must clearly appear as well as the manner in which such interest is affected by the decree complained of, which should probably be done by a sworn petition for appeal, setting up those facts and petitioning for an order of intervention allowing them to become parties for the purposes of appeal. (Aiken v. Smith, 54 Fed. 896, 4 C. C. A. 654.)

Such intervention, however, rests within the discretion of the court, and if the petition is refused *mandamus* will not lie. (In re Columbia Real Estate Co., 112 Fed. 645, 50 C. C. A. 406.)

An example of a case in which an appeal may be allowed on behalf of one not a party to the original proceeding is found in the case of an appeal by a receiver in a foreclosure suit who is not a party to the original suit. (Hovey v. McDonald, 109 U. S. 155, 27 **L. Ed.** 889, 3 Sup. Ct. 136.)

Another illustration is the case of a purchaser of property at a foreclosure sale. (Davis v. Mercantile Trust Co., 152 U. S. 594, 38 L. Ed. 563, 14 Sup. Ct. 693.)

Where a corporation is a party to a suit, an appeal may be prosecuted in the corporate name, but if the appellant is a partnership, the appeal may not be taken in the firm name, but must be prosecuted in the name of the individual partners, each of whom must personally sign the appeal bond. (Estis v. Trabue, 128 U. S. 225, 32 L. Ed. 437, 9 Sup. Ct. 58.)

The rule that all parties must be joined in an appeal applies to appellees as well as to appellants, but where several appellees are representatives of a class, "citation need be served only upon a few of each class who should appear in good faith in defense of the interest of that class." (Kidder v. Fidelity Ins. Trust & Safe Deposit Co., 105 Fed. 821, 44 C. C. A. 593.)

§ 1652. **Time for Writs of Error or Appeals from District Courts to the Supreme Court of the United States.** The act of Sept. 6, 1916, c. 448, § 6 (quoted § 1655, below), provides that no writ of error, appeal or writ of *certiorari* intended to bring up a case for review by the Supreme Court shall be allowed unless applied for within three months after the entry of the judgment or decree complained of. *Certiorari* to the Philippines may be in six months.

§ 1653. **Time for Writs of Error or Appeals to Circuit Courts of Appeals.** Those sections of the Judicial Code relating to circuit courts of appeals are largely re-enactments of the act of March 3, 1891. However, section 11 of that act prescribing the time, procedure and method of appeal has not been re-enacted (except as to the concluding sentence thereof, which now constitutes section 132, Judicial Code), but still remains in force.

That part of the act relating to the time within which appeals and writs of error must be taken is as follows:

Part § 11, Act March 3, 1891. "No appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit court of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed: *Provided, however,* That in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeal or writs of error in such cases taken to or sued out from the circuit courts of appeals." (6 Fed. Stats. Ann., 2d ed., p. 161; 3 U. S. Comp. Stats. 1916, § 1647.)

§ 1654. Time for Appeals to Circuit Courts of Appeals from Interlocutory Orders.

Part § 129, Jud. Code. "The appeal . . . (from an interlocutory order or decree, granting, continuing, refusing, dissolving, or refusing to dissolve an injunction, or appointing a receiver,—to the circuit court of appeals) must be taken within thirty days from the entry of such order or decree." (36 Stats. 1134; 5 Fed. Stats. Ann., 2d ed., p. 629; 2 U. S. Comp. Stats. 1916, § 1121; Foster's Federal Practice, 5th ed., pp. 930, 1943, 2411, 2436; Simkins' Federal Equity Suit, 3d ed. pp. 626, 627, 628, 629.)

§ 1655. Time for Writs of Error or Appeals from Circuit Courts of Appeals to Supreme Court. Writs of error or appeals in the third class of cases above enumerated must be taken within three months.

§ 6, Act Sept. 6, 1916, c. 448. Time for application for writ of error, appeal, or certiorari. "No writ of error, appeal, or writ of *certiorari* intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of: Provided, That writs of *certiorari* addressed to the Supreme Court of the Philippine Islands may be granted if application therefor be made within six months." (39 Stats., p. ——, 6 Fed. Stats. Ann., 2d ed., p. 158, in note to § 1008, Rev. Stats.; 2 U. S. Comp. Stats. 1916, § 1228a, p. 1805.)

§ 1656. Time to Secure Review of State Court Decisions.

§ *1003, Rev. Stats.* "Writs of error from the Supreme Court to a state court, in cases authorized by law, shall be issued in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States." (6 Fed. Stats. Ann., 2d ed., p. 194; 3 U. S. Comp. Stats. 1916, § 1662.)

The writ of error must therefore be allowed within three months after the entry of judgment or decree, as provided by § 6, Act Sept. 6, 1916, c. 448 (quoted § 1655, *supra*).

§ 1657. Procedure on Writs of Error and Appeals to Circuit Courts of Appeals the Same as to Supreme Court.

Part § 11, Act March 3, 1891, c. 517. "All provisions of law now in force regulating the methods and system of review through appeals and writs of error shall regulate the methods and systems of appeals and writs of error provided for in this act in respect to the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error." (6 Fed. Stats. Ann., 2d ed., p. 170; 3 U. S. Comp. Stats. 1916, § 1651.)

The effect of this act is to make the practice and procedure upon appeals and writs of error to the circuit court of appeals identical with that upon appeal and error to the Supreme Court, except as to difference resulting from differences between rules of the various circuits. The latter part of this act is § 132, Jud. Code, quoted above, § 1510, giving the circuit judges the same powers and duties as other judges as to allowance of appeals and writ of error.

§ 1658. Allowance of Writs of Error or Appeals. The first step in prosecuting an appeal, whether to the Supreme Court or the circuit court of appeals, is to have the appeal "allowed." When this is done the appeal is "taken" in the sense prescribed by the statutes fixing the time for appeal.

There are two methods of having an appeal allowed:

First. When the decree of the lower court is rendered, appellant may give notice of appeal in open court, at the same time filing his assignment of errors (which by court rules must be filed before the allowance) and also filing and procuring the acceptance of the necessary bond within the term of court then pending. An appeal thus allowed in open court is perfected without any written petition for appeal or citation.

Second. If the appeal is not perfected as above, the first step toward having it allowed is the preparation and filing of a petition for appeal addressed to the lower court, which may be substantially in the following form:

[Title of Cause.] [Title of Court.]

In Equity.

PETITION FOR APPEAL.

To the Honorable ——, District Judge.

The above-named —— feeling aggrieved by the decree rendered and entered in the above-entitled cause on the —— day of ——, A. D. 19—, does hereby appeal from said decree to the circuit court of appeals for the —— circuit [or to the Supreme Court of the United States] for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and document upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the —— Circuit [or to the Supreme Court of the United States, sitting at ——], under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of him be made.

His petition having been filed, it must be allowed, for in all appealable cases, the right of appeal is absolute, the only discretion which the judge can exercise being as to the sufficiency of the appeal bond, and if he refuses to allow the appeal, *mandamus* may be resorted to.

But a writ of error may be denied if the grounds assigned in the assignment of errors appear insufficient to the court. (Simpson v. First National Bank, 129 Fed. 257, 63 C. C. A. 371.)

No particular form of allowance is required, the usual proceeding being an indorsement upon the petition, to the following effect:

Appeal allowed upon giving bond as required by law for the sum of $——.

——, Judge.

Or the following separate order of allowance may be made:

[Title of Cause.] [Title of Court.]

In Equity—No. ——.

ORDER ALLOWING APPEAL.

On motion of ——, Esq., solicitor and counsel for complainant, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of $——. [If *supersedeas* be desired, here insert, "the same to act as a *supersedeas* bond and also as a bond for cost and damages on appeal."]

Dated ——, 19—,

——, Justice.

The mere approval of the bond or signing of the petition by the judge amounts to an allowance of the appeal, and if the petition for appeal and assignment of errors are filed within the time allowed, a subsequent allowance of the appeal operates by relation as of that time, and the appeal is properly perfected within that time.

§ 1659. Amendment of Writ of Error. Prior to the passage of the act of June 1, 1872, any formal defect in a writ of error defeated the jurisdiction of the Supreme Court, and could not be so amended as to cure any such defect. (Insurance Co. of Valley of Va. v. Mordecai, 21 How. 195, 16 **L. Ed.** 94; Porter v. Foley, 21 How. 393, 16 **L. Ed.** 154; Carroll v. Dorsey, 20 How. 204, 15 **L. Ed.** 803; Hodge v. Williams, 22 How. 87, 16 **L. Ed.** 237; Wilson v. Life & F. Ins. Co., 12 Pet. 140, 9 **L. Ed.** 1032; Deneale v. Archer, 8 Pet. 526, 8 **L. Ed.** 1033; Davenport v. Fletcher, 16 How. 142, 14 **L. Ed.** 879; Miller v. McKenzie, 10 Wall. 582, 19 **L. Ed.** 1043; Mus-

sina v. Cavazos, 6 Wall. 355, 361, 18 **L. Ed.** 810; The Protector, 11 Wall. 82, 20 **L. Ed.** 47; Moulder v. Forest, 154 U. S. 567, 19 **L. Ed.** 154, 14 Sup. Ct. 1207.)

§ 1005, Rev. Stats., taken from the act of June 1, 1872, permits an amendment of writs of error as to matters of form subject to the discretion of the court. The section is as follows:

> "The Supreme Court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: *Provided,* the defect has not prejudiced, and the amendment will not injure the defendant in error." (6 Fed. Stats. Ann., 2d ed., p. 196; 3 U. S. Comp. Stats. 1916, § 1664.)

This section permits amendments in the instances therein enumerated to be allowed by the circuit court of appeals as well as by the Supreme Court, it being provided by the act of March 3, 1891, section 11, that "all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the method and system of appeals and writs of error provided for in this act in respect of the circuit court of appeals, including all provision for bonds or other securities to be required and taken on such appeals and writs of error." (Cotter v. Alabama G. S. R. Co., 61 Fed. 747, 10 C. C. A. 35.)

The statute is largely self-explanatory as to the cases in which an amendment may be allowed, but it is to be borne in mind that permission to amend is not a matter of right, but is given only when in the discretion of the court it is deemed just and proper. (Pearson v. Yewdall, 95 U. S. 294, 24 **L. Ed.** 436.)

The theory of § 1005, Rev. Stats., is that a colorable writ shall operate as a writ of error, the court being given power to amend

it in so far as it is informal. (Cotter v. Alabama G. S. R. Co., 61 Fed. 747, 10 C. C. A. 35.)

But a purported writ of error in the name of the chief justice of the supreme court of a state, bearing the teste of that chief justice, signed by the clerk and sealed by the seal of that court, but not in the name of the President, or under the authority of the United States, is not a colorable writ in such sense as to allow amendment. (Bondurant v. Watson, 103 U. S. 278, 26 **L. Ed.** 447.)

However, a writ running in the name of the President of the United States, but defective in that it was not tested by the chief justice of the United States, nor signed by the clerk of the Supreme Court of the United States, and did not bear the seal of either the Supreme Court or the circuit court, but, instead, was sealed with the seal of the supreme court of Texas, tested by the chief justice and signed by the clerk of that court, is held to be a colorable writ and subject to amendment. (Texas etc. Ry. Co. v. Kirk, 111 U. S. 486, 28 **L. Ed.** 481, 4 Sup. Ct. 500.)

The power to permit the amendment of a defective writ under this section is very liberal, and it is not fatal that more than six months had passed since the final decree sought to be reviewed was pronounced. The statute allows the amendment at any time in the discretion of the court. (Cotter v. Alabama G. S. R. Co., 61 Fed. 747, 10 C. C. A. 35.)

Power to allow an amendment, however, depends primarily upon whether or not the defect can be remedied by reference to the accompanying record. If it cannot, no amendment can be granted. (Cotter v. Alabama G. S. R. Co., 61 Fed. 750, 10 C. C. A. 35; Martin v. Burford, 176 Fed. 555, 100 C. C. A. 159; Estis v. Trabue, 128 U. S. 228, 32 **L. Ed.** 437, 9 Sup. Ct. 58.)

But when an amendment is allowed, it dates back by relation to the date of its original issuance, and presupposes jurisdiction from that date. (Knickerbocker Life Ins. Co. v. Pendleton, 115 U. S. 339, 29 **L. Ed.** 432, 6 Sup. Ct. 74.)

No amendment can be allowed if it will result in prejudice or injury to the adverse party, or if it appears that the amendment requested, if granted, would be useless, as in a case where the question presented by the record is already settled by previous decisions of the Supreme Court. (Pearson v. Yewdall, 95 U. S. 294, 24 **L. Ed.** 436.)

The name of a party omitted by accident may be added by way of amendment if the same is authorized by a reference to the record. (Walton v. Marietta Chair Co., 157 U. S. 346, 39 **L. Ed.** 725, 15 Sup. Ct. 626; Thomas v. Green County, 146 Fed. 969, 77 C. C. A. 487.)

But the objection that a plaintiff is not the real party in interest cannot be set up by way of amendment, and the same may be said of the objection that the plaintiff is without capacity to sue. These things must be set up before trial. (Texas & P. R. Co. v. Jackson, 193 Fed. 948, 113 C. C. A. 576; St. Louis & S. F. R. Co. v. Herr, 193 Fed. 950, 113 C. C. A. 578; Northwestern S. S. Co. v. Cochran, 191 Fed. 149, 111 C. C. A. 626.)

Amendments in "all particulars of form" have been held to include a case where the writ of error was not attached to the transcript nor made a part of the record, but was returned to the appellate court upon the day when the transcript was filed therein properly indorsed. Having performed its function, it is permitted to be attached to the record after being received by the appellate court as should have been done in the first instance. (Cotter v. Alabama G. S. R. Co., 61 Fed. 747, 10 C. C. A. 35.)

Amendments under this section have been allowed in the following cases: Texas R. Co. v. Kirk, 111 U. S. 486, 28 **L. Ed.** 481, 4 Sup. Ct. 500; Course v. Stead, 4 Dall. 22, 1 **L. Ed.** 724; Burnham v. North Chicago Street R. R. Co., 87 Fed. 168, 30 C. C. A. 594; Alaska United Gold Mining Co. v. Keating, 116 Fed. 561, 53 C. C. A. 655; Miller v. Texas, 153 U. S. 535, 38 **L. Ed.** 812, 14 Sup. Ct. 874; McPhaul v. Lapsey, 20 Wall. 282, 22 **L. Ed.** 346; Walton v. Marietta Chair Co., 157 U. S. 342, 39 **L. Ed.** 725, 15 Sup. Ct. 626; Pacific Bank v. Mixter, 114 U. S. 463, 29 **L. Ed.** 221,

5 Sup. Ct. 944; Moore v. Simonds, 100 U. S. 145, 25 **L. Ed.** 590; Gumbel v. Pitkin, 113 U. S. 545, 28 **L. Ed.** 1128, 5 Sup. Ct. 616; Estis v. Trabue, 128 U. S. 225, 32 **L. Ed.** 437, 9 Sup. Ct. 58; United States v. Schoverling, 146 U. S. 76, 36 **L. Ed.** 893, 13 Sup. Ct. 24; Atherton v. Fowler, 91 U. S. 143, 23 **L. Ed.** 265; Evans v. Brown, 109 U. S. 180, 27 **L. Ed.** 898, 3 Sup. Ct. 83; Mossman v. Higginson, 4 Dall. 12, 1 **L. Ed.** 720; Sea v. Connecticut Mutual Life Ins. Co., 154 U. S. 659, 25 **L. Ed.** 772, 14 Sup. Ct. 1191; Hampton v. Rouse, 15 Wall. 684, 21 **L. Ed.** 250; Semmes v. United States, 91 U. S. 21, 23 **L. Ed.** 193; National Bank v. Bank of Commerce, 99 U. S. 608, 25 **L. Ed.** 362.

§ 1660. Writ of Error—By Whom Issued.

§ *1004, Rev. Stats.* "Writs of error returnable to the Supreme Court or a circuit court of appeals may be issued as well by the clerks of the district courts, under the seals thereof, as by the clerk of the Supreme Court or of a circuit court of appeals. When so issued they shall be, as nearly as each case may admit, agreeable to the form of a writ of error issued by the clerk of the supreme court or the clerk of a circuit court of appeals." (37 Stats. 54; 6 Fed. Stats. Ann., 2d ed., p. 194; 3 U. S. Comp. Stats. 1916, § 1663.)

§ 1661. Assignment of Errors on Writ of Error.

§ *997, Rev. Stats.* "There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party." (6 Fed. Stats. Ann., 2d ed., p. 163; 3 U. S. Comp. Stats. 1916, § 1653.)

This assignment of errors must set forth separately and particularly each error asserted and intended to be urged under Supreme Court Rule 35 (Appendix, *post*), and C. C. A. Rule 11 (Appendix, *post*).

It must be filed *with* the petition for the writ, and no writ can be allowed until the assignment has been filed. The form of assign-

ment suggested § 1662 below, will suffice as a guide for the assignment upon error.

The assignment of errors on appeal differs from the petition for appeal in that it must set out specifically and directly every respect in which the decree is erroneous and the reason why it is so; while the petition asks for the allowance of the appeal in general terms.

The assignment of errors must be so complete and clear that the court may obtain therefrom a specific statement of the question presented without reference to the brief or any other source outside of the assignment itself. (Van Gunden v. Virginia Coal & Iron Co., 52 Fed. 838, 3 C. C. A. 294; Grape Creek Coal Co. v. Farmers' Loan & Trust Co., 63 Fed. 891, 12 C. C. A. 350.)

§ 1662. Form of Assignment of Errors.

[Title of Cause.] [Title of Trial Court.]

In Equity—No. ——.

ASSIGNMENT OF ERRORS.

Now comes the defendant in the above-entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above-entitled cause, from the decree made by this honorable court on the —— day of ——, 19—.

I.

That the United States district court for the —— district of —— erred in overruling the demurrer interposed by the defendant and appellant to the original complaint filed in the cause.

II.

[State in separate paragraphs each error complained of.]

Wherefore the appellant prays that said decree be reversed and that said district court for the —— district of —— be ordered to enter a decree reversing the decision of the lower court in said cause.

——, Attorneys for Appellant.

§ 1663. Citation. Except in cases of appeals allowed in open court at the term during which the decree appealed from was rendered, a citation returnable at the same term with the appeal

or writ of error is necessary to perfect jurisdiction of the appeal or writ of error, unless waived. (Jacobs v. George, 150 U. S. 415, 37 **L. Ed.** 1127, 14 Sup. Ct. 159; Hewitt v. Filbert, 116 U. S. 142, 29 **L. Ed.** 581, 6 Sup. Ct. 319; West v. Irwin, 54 Fed. 419, 4 C. C. A. 401.)

§ *999, Rev. Stats.* "When the writ is issued by the Supreme Court to a circuit court, the citation shall be signed by a judge of such circuit court, or by a justice of the Supreme Court, and the adverse party shall have at least thirty days' notice; and when it is issued by the Supreme Court to a state court, the citation shall be signed by the chief justice or judge, or chancellor of such court, rendering the judgment or passing the decree complained of, or by a justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice." (6 Fed. Stats. Ann., 2d ed., p. 184; 3 U. S. Comp. Stats. 1916, § 1659, p. 3316.)

§ *998, Rev. Stats.* "When the writ is issued by a circuit court to a district court, the citation shall be signed by the judge of such district court, or by the circuit judge of such circuit court, or by a justice of the Supreme Court, and the adverse party shall have at least twenty days' notice." (6 Fed. Stats. Ann., 2d ed., p. 183; 3 U. S. Comp. Stats. 1916, § 1658, p. 3312.)

This citation is a formal notice of the allowance of an appeal, is intended only for the purpose of notice, is not jurisdictional, and may be waived or substituted by proof of other equivalent notice. (Farmers' Loan & Trust Co. v. Chicago & N. R. R. Co., 73 Fed. 317, 19 C. C. A. 477; Dayton v. Lash, 94 U. S. 112, 24 **L. Ed.** 33; Grigsby v. Purcell, 99 U. S. 505, 25 **L. Ed.** 354; Chicago etc. R. Co. v. Blair, 100 U. S. 661, 25 **L. Ed.** 587; Jacobs v. George, 150 U. S. 415, 37 **L. Ed.** 1127, 14 Sup. Ct. 159.)

A distinction is drawn, however, between citation on appeal, and upon error, in that notice in open court, in the former, excuses the issuance of the citation, while in the latter it does not. (United States v. Phillips, 121 U. S. 254, 30 **L. Ed.** 914, 7 Sup. Ct. 874; Loveless v. Ransom, 109 Fed. 391, 48 C. C. A. 434.)

The citation should be signed as prescribed by §§ 998–999, Rev. Stats., but failure to sign is immaterial if the defendant in error enter his appearance. (Freeman v. Clay, 48 Fed. 849, 1 C. C. A. 115.)

No particular form of citation is required by statute, but, in the absence of a printed form supplied by the court from which the appeal is taken, the following is suggested:

[Title of Trial Court.]

In Equity—No. ——.

[Title of Cause.] CITATION ON APPEAL.

United States of America,—ss.

To —— and ——, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the —— day of ——, A. D. 19—, pursuant to an order allowing an appeal filed and entered in the clerk's office of the district court of the United States for the —— district of —— from a final decree signed, filed, and entered on the —— day of ——, 19—, in that certain suit, being in equity No. ——, wherein —— is plaintiff and you are defendant and appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable ——, United States District Judge for the —— District of ——, this —— day of ——, 19—, and of the Independence of the United States ——.

——,

U. S. District Judge for the District of ——.

The citation must be served personally upon the attorney of record, or the party who recovers judgment,—the return being made according to the rule of court governing the service of citations. (Supreme Court Rule 8, C. C. A. Rule 14.)

§ 1664. Bond. The petition having been filed, accompanied by the assignment of errors, a bond is required of the appellant payable to the appellee, conditioned as provided in the following quoted section:

§ *1000, Rev. Stats.* "Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a *supersedeas* and stays execution, or all costs only where it is not a *supersedeas* as aforesaid." (6 Fed. Stats. Ann., 2d ed., p. 187; 3 U. S. Comp. Stats. 1916, § 1660.)

The text and form suggested below apply as well to error proceedings with such changes in phraseology as may be necessary to adapt it.

This bond must be approved before the appeal is perfected, but it is not jurisdictional, and if not given at the time when the appeal is taken, the failure to do so constitutes a mere irregularity which may be cured by the Supreme Court allowing the appellant to file the proper bond within a reasonable time. (Brown v. McConnel, 124 U. S. 489, 31 **L. Ed.** 495, 8 Sup. Ct. 559; Schenck v. Diamond Match Co., 73 Fed. 22, 19 C. C. A. 352; Anson v. Blue Ridge R. R. Co., 23 How. 1, 16 **L. Ed.** 517; Davidson v. Lanier, 4 Wall. 447, 18 **L. Ed.** 377; Seymour v. Freer, 5 Wall. 822, 18 **L. Ed.** 564.)

In accordance with this rule a bond furnished one month after the appeal is taken has been held to be furnished within a reasonable time. (Schenck v. Diamond Match Co., 73 Fed. 22, 19 C. C. A. 352.)

A lapse of four years where permission to supply the bond has never been asked has been held to constitute ground for dismissal of appeal. (Beardsley v. Arkansas & L. R. R. Co., 158 U. S. 123, 39 **L. Ed.** 919, 15 Sup. Ct. 786.)

Not being jurisdictional, bond may be waived by the appellees. (Kingsbury v. Buckner, 134 U. S. 650, 33 **L. Ed.** 1047, 10 Sup. Ct. 638.)

The sufficiency of the security is discretionary with the trial judge, and he may, within his discretion, accept a bond signed by

any number of sureties, or one in which they are either jointly and severally or jointly or severally bound, or one in which each surety is only bound severally for a specified part of the security. (New Orleans Ins. Co. v. Albro Co., 112 U. S. 506, 28 **L. Ed.** 809, 5 Sup. Ct. 289.)

The security required upon appeal must be taken by the justice or judge signing the citation. He cannot delegate this power to the clerk. (Freeman v. Clay, 48 Fed. 849, 1 C. C. A. 115; O'Reilly v. Edrington, 96 U. S. 724, 24 **L. Ed.** 659; Martin v. Hunter's Lessee, 1 Wheat. 361, 4 **L. Ed.** 111; Haskins v. St. L. & E. R. R. Co., 109 U. S. 106, 27 **L. Ed.** 873, 3 Sup. Ct. 72.)

But if he should do so, the appeal will not usually be dismissed, but opportunity will be afforded the appellant to secure a bond properly approved by the judge. (Cases last cited above.)

All obligees should be individually named in the bond to insure certainty, but the fact that they are not, as where it is made payable to John Smith et al., will not be considered grounds for the dismissal of the appeal, and opportunity will be given to file a proper bond. (Swift & Co. v. Kortrecht, 110 Fed. 328, 49 C. C. A. 68.)

On the other hand, if others besides the party from whom the decree appealed from is taken are named as obligees in the bond, its validity is not thereby affected. (Hill v. Chicago & E. Ry. Co., 129 U. S. 170, 32 **L. Ed.** 651, 9 Sup. Ct. 269.)

The bond may be in the following form:

[Title of Trial Court.]

In Equity—No. ——.

[Title of Cause.] BOND ON APPEAL.

Know all men by these presents, that we, ——, as principal, and —— and ——, as sureties, of the county of ——, state of ——, are held and firmly bound unto —— in the sum of $——, lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, by these presents.

Sealed with our seals and dated this —— day of ——, 19—.

Whereas the above-named ——, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment of the district court for the —— district of ——, in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named —— shall prosecute his said appeal to effect and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

——
——
——

State of ——,
County of ——, } ss.

On the —— day of ——, 19—, personally appeared before me —— and ——, respectively known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said —— and ——, being respectively by me duly sworn, says, each for himself and not one for the other, that he is a resident and householder of the said county of —— and that he is worth the sum of $—— over and above his just debts and legal liability and property exempt from execution.

——
——
——

Subscribed and sworn to before me this —— day of ——, A. D. 19—.
[Seal] ——, Notary Public.

The within bond is approved both as to sufficiency and form this —— day of ——, 19—.

——, Justice.

§ 1665. No Bond Required of United States.

§ *1001, Rev. Stats.* "Whenever a writ of error, appeal, or other process in law, admiralty, or equity issues from or is brought up to the Supreme Court or a circuit court, either by the United States or by direction of any department of the government, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit or to answer in damages or costs. In case of an adverse decision,

such costs as by law are taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted." (6 Fed. Stats. Ann., 2d ed., p. 192; 3 U. S. Comp. Stats. 1916, § 1661.)

§ 1666. Supersedeas.

§ *1007, Rev. Stats.* "In any case where a writ of error may be a *supersedeas,* the defendant may obtain such *supersedeas* by serving the writ of (or) error, by lodging a copy thereof for the adverse party in the clerk's office, where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment or afterward, with the permission of a justice or judge of the appellate court. And in such cases, where a writ of error may be a *supersedeas,* executions shall not issue until the expiration of ten days." (6 Fed. Stats. Ann., 2d ed., p. 198; 3 U. S. Comp. Stats. 1916, § 1666.)

See also Rule 29, Supreme Court, and Rules C. C. A., in our Appendix.

Under this section, which applies alike to appeals and writs of error, it is held that *supersedeas,* if applied for in strict compliance with the statute, is a matter of right. (McCourt v. Singers-Bigger, 150 Fed. 102, 80 C. C. A. 56.)

No discretion is vested in the judge, other than as to the amount of the bond, except in appeals from injunction, where the granting of a *supersedeas* is discretionary under § 129, Jud. Code (§ 1502, *supra*).

Strict compliance with the statute is required, however; for *supersedeas* is purely a statutory remedy, and unless the prescribed steps are taken within sixty days, Sundays excluded, from the rendering of the decree, it is not within the power of the court to award a *supersedeas,* although the bond required may be given

after that time, with the permission of the appellate court. (Sage v. Cent. Ry. Co., 93 U. S. 417, 23 **L. Ed.** 935; New England R. Co. v. Hyde, 101 Fed. 398, 41 C. C. A. 404.)

Commenting upon the clause extending the time for giving the bond, the Supreme Court says in the case of Kitchen v. Randolph, 93 U. S. 86, 23 **L. Ed.** 810:

> "Had the section stopped here [the first clause] a plaintiff in error or appellant would have been compelled to elect, when he sued out his writ of error or took his appeal, whether he would have a *supersedeas* or not; because it is made one of the conditions of the stay of proceedings that the requisite security shall be given, upon the issuing of the citation. Having once made his election, he would be concluded by what he had done. But Congress foreseeing, undoubtedly, that cases might arise in which serious loss would result from such a rule, went further, and, in a subsequent part of the section, provided that if a writ of error had been served, as required in the first paragraph, a stay might be had as a matter of right by giving the required security within sixty days, and afterwards, as a matter of favor, if permission could be obtained from the designated justice or judge. Thus prompt action in respect to the writ was required and indulgence granted only as to the security."

The *supersedeas* order may be incorporated in the bond, or it may be in the form of a separate order as follows:

[Title of Trial Court.]

[Title of Cause.] SUPERSEDEAS ORDER.

This cause coming on to be heard this —— day of —— 19—, upon the application of the appellant for an appeal to the Supreme Court of the United States, and said appeal having been allowed, it is ordered that the same shall operate as a *supersedeas,* the said appellant having executed bonds in the sum of $—— as provided by law, and the clerk is hereby directed to stay the mandate of the district court of the —— district of ——, until the further order of this court.

——, Justice.

The effect of a *supersedeas* is to hold in abeyance all proceedings in the court below, until the decree is affirmed. (Ransom v. Pierre, 101 Fed. 669, 41 C. C. A. 585; Hovey v. McDonald, 109 U. S. 150, 27 **L. Ed.** 888, 3 Sup. Ct. 136.)

§ 1667. Injunction Pending Appeal.

Equity Rule 74. "When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying, or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party." (3 U. S. Comp. Stats. 1916, § 1536, p. 2527; Simkins' Federal Equity Suit, 3d ed., p. 629.)

§ 1668. Proceedings in Forma Pauperis. Since the enactment of the act June 25, 1910, c. 435, amending the act of July 20, 1892, c. 209 (quoted § 404, *supra*), the Supreme Court holds that the statute applies to appellate proceedings, writs of error or appeals.

In Kinney v. Plymouth Rock Squab Co., 236 U. S. 43, 59 **L. Ed.** 457, at p. 458 (35 Sup. Ct. 236), the court says:

"Clarifying the 1st section as amended by these considerations, it becomes clear that the sole change operated by the amendment was to bring defendants within the statute, and to extend its provisions so as to embrace, first, proceedings on application for the allowance of a writ of error or appeal to this court and the circuit court of appeals, second, the appellate proceedings in such courts. This being true, it is clear that as to the new subjects, the allowance of the right in those cases was made to depend upon the exercise of the same discretion as to the meritorious character of the cause to the same extent provided under the statute before amendment. That is to say, there is no ground for a contention that at one and the same time the statute brought certain proceedings within its scope and yet exempted them from its operation. Indeed, this conclusion is not alone sustained by the implica-

tion resulting from the fact that the safeguards provided for the exercise of the authority found in the statute as originally enacted were not changed by the amendment, but further plainly results from the express provisions of the amended section (46) manifesting the purpose to subject the granting of the right in both the new instances provided for, to the exercise of the judicial discretion to determine the poverty and good faith of the applicant and the meritorious character of the cause in which the relief was asked."

§ 1669. Record on Error.

§ *997, Rev. Stats.* "There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party." (6 Fed. Stats. Ann., 2d ed., p. 163; 3 U. S. Comp. Stats. 1916, § 1653.)

In addition to this section, the contents of the transcript on error, like that on appeal, is governed by Supreme Court Rule 8, and Circuit Court of Appeals Rules 14 and 15 (Appendix, *post*).

The complete record upon a writ of error taken from a judgment at law consists of the following papers and proceedings: The complaint or declaration; the subpoena properly indorsed with the marshal's return; the defensive pleading and joining of issue; proceedings in impaneling the jury, verdict of the jury; judgment of the court; bill of exceptions; petition for writ of error; assignment of errors; order allowing the writ of error; the writ of error; the citation; the bond, and the certificate of the clerk authenticating the record.

It is not always necessary that all the documents enumerated be incorporated in the transcript, and the better practice is a stipulation between counsel, agreeing as to the contents of the record. If this cannot be done, it is the duty of the clerk to make up the record in accordance with a precipe filed by the plaintiff in error. The instructions prepared by the circuit courts of appeals of the fourth and eighth circuits (Appendix, *post*) will be found to be of use to the practitioner.

It is to be noted that by the terms of § 997, Rev. Stats. *supra,* the transcript is to be annexed to and returned with the original writ of error, and must be authenticated. The clerk's certificate of authentication may be in substantially the following form:

[Title of Court.]

[Title of Cause.] CERTIFICATE OF TRANSCRIPT.

I, ——, Clerk of the —— Court, etc., hereby certify the foregoing transcript, consisting of —— pages constitutes a full, true and correct copy of the proceedings had and orders entered in the above-entitled cause, as set forth therein, as the same appears on file and of record in this office, with the exception of the writ of error, the citation, and assignment of errors herewith attached, at pages ——, ——, and ——, respectively, which are the original writ, assignment and citation.

The foregoing constitutes the entire transcript in the cause.

Witness my hand and the official seal of said Court, this —— day of ——, A. D. 19—.

——, Clerk.

§ 1669a. Transcript on Appeal and Error.

Part Supreme Court Rule 8. "1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court. . . .

"2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

"3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

"4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any district court, that original papers of any kind should be inspected in this court, upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original

papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings." (2 U. S. Comp. Stats. 1916, p. 1812.)

See also Rule 14, Circuit Court of Appeals, in Appendix.

§ *698, Rev. Stats.* "Upon the appeal of any cause in equity, or of admiralty and maritime jurisdiction, or of prize or no prize, a transcript of the record, as directed by law to be made, and copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal, shall be transmitted to the Supreme Court: *Provided,* That either the court below or the Supreme Court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof. And on such appeals no new evidence shall be received in the Supreme Court, except in admiralty and prize causes." (6 Fed. Stats. Ann., 2d ed., p. 174; 3 U. S. Comp. Stats. 1916, § 1654.)

Record on appeal as made up by the clerk of the lower court if complete contains the following papers and proceedings: The bill of complaint; process or subpoena, with the proper return of the marshal indorsed thereon; the answer or other defensive pleading; the testimony, exhibits, etc., of both parties, plaintiff and defendant; the opinion and decree of the court; the petition for appeal; the assignment of error; bond on appeal; the citation on appeal and the clerk's certificate. (See instruction for preparation of record contained in Rules of C. C. A. after Rule 38, 4th Circuit, and Rule 45, 8th Circuit, Appendix, *post.*)

It is not always necessary, however, that all of these papers and proceedings are necessary for a hearing of the appeal, and therefore it may be stipulated by counsel for the opposing party that certain proceedings may be omitted from the record.

If, when the record reaches the appellate court, anything has been omitted therefrom which is considered necessary for a hearing of the appeal, the proper procedure is for counsel to suggest to the appellate court a diminution of the record, whereupon the

omitted portion will, if considered necessary by the court, be ordered sent up.

§ 1670. Reduction and Preparation of Record on Appeal and Error to Supreme Court.

Part Supreme Court Rule 8, Subd. 1. "In order to enable the clerk of the court (to which any writ of error may be directed) to perform such duty (i. e., transmitting copy of the record), and for the purpose of reducing the size of transcripts of records in cases brought to this court by appeal or writ of error, by eliminating all papers not necessary to the consideration of questions to be reviewed, it shall be the duty of the appellant or plaintiff in error, or his attorney, to file with the clerk of the lower court, together with proof or acknowledgment of service of a copy on the appellee or defendant in error, or his counsel, a precipe, which shall indicate the portions of the record to be incorporated into the transcript of the record on such appeal or writ of error. Should the appellee, or defendant in error, or his counsel, desire additional portions of the record incorporated into the transcript of the record to be filed in this court, he shall file with the clerk of the lower court his precipe also, within ten days thereafter (unless the time shall be enlarged by a judge of the lower court), indicating such additional portions of the record desired by him.

"The clerk of the lower court shall transmit to this court, as the transcript of the record in the case, only the portions of the record below designated by both parties as above provided.

"The parties or their counsel, however, may agree, by written stipulation to be filed with the clerk of the lower court, the portions of the record which shall constitute the transcript of record on appeal, or writ of error, and the clerk in such case shall transmit only the papers designated in such stipulation.

"If this court shall find that portions of the record unnecessary to a proper presentation of the case have been incorporated into the transcript by either party, the court may order that the whole or any part of the clerk's fee for supervising the printing, and of the cost of printing the record, be paid by the offending party." (2 U. S. Comp. Stats. 1916, p. 1812.)

§ 1671. Reduction and Preparation of Record Under New Equity Rules.

Equity Rule 75. "In case of appeal:

"(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a precipe which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his precipe also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

"(b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his precipe under paragraph (a) of this rule. He shall also notify the other parties or their solicitors of such lodgment, and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

"(c) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph (b) of this rule and shall be covered by the directions which the court or judge may give on the subject." (3 U. S. Comp. Stats. 1916, p. 2527; Foster's Federal Practice, 5th ed., § 704, p. 2499; Simkins' Federal Equity Suit, 3d ed., (a), pp. 707, 708, (b) p. 708, (c) p. 708.)

Equity Rule 76. "In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.

"If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript." (3 U. S. Comp. Stats. 1916, § 1536, p. 2529.)

Equity Rule 77. "When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the district court or the judge thereof, may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement, when filed in the office of the clerk of the district court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal." (3 U. S. Comp. Stats. 1916, § 1536, p. 2529.)

Construction by Circuit Court of Appeals.—Per Curiam.

"Motions recently decided and others now pending involving these rules justify a formal statement of our conclusions.

"Rule 75 fixes no time within which the statement of evidence must be settled and filed in order to 'become a part of the record for the purposes of the appeal.' Undoubtedly, the better practice is to complete this step before claiming, or, at least, before perfecting the appeal, and if the term expires before the final statement of evidence is filed, to enter an order carrying this matter into the next term: but where appeals are required within thirty days, or even within ten days, the time may be wholly insufficient to perfect the record in this respect, and the expiration of the term may very commonly be forgotten, particularly as it has never been a matter of importance in equity appeals. It is said that the completing of this statement of evidence corresponds to the settling of a bill of exceptions at law, and the familiar rule is invoked that a purported bill of exceptions which was not settled within the trial term or pursuant to a reservation during the trial term is a nullity and will be stricken from the record. We are not satisfied that the analogy is close enough to justify the incorporation of this harsh rule into the practice pursuant to Rule 75, which must have been adopted with due consideration of the existing practice by which appeals were claimed and perfected regardless of the expiration of terms; and we conclude that the trial court has power to approve and direct the filing of the statement of evidence, although the term has expired when the decree was rendered, and although no order was entered carrying the subject matter over until the next term.

"The same general view leads also to the conclusion that the perfecting of an appeal by the approval of a bond and the signing of citation does not deprive the trial court of jurisdiction to settle the evidence. It is true that for general purposes, jurisdiction over the cause is thereby ended, and that the shaping of this statement of evidence involves the decision by the judge of disputed claims; but, upon the whole, the proceeding is rather ministerial, and it sufficiently pertains to the making of the return to the appeal, so that we think a statement of evidence so approved and filed cannot, for that reason alone, be stricken from the record.

"Instances occur where Rule 75 is wholly disregarded, and the return to the appeal includes the evidence in full, in accordance with the old practice, and we are asked to dismiss appeals where the record is so made up, or to strike out the statement of evidence, thereby leading to an affirmance. To send the record back for correction in this respect involves delay and the exercise of uncertain power; while to dismiss the appeal or to strike all the evidence from the record may cause the loss of substantial rights through the blunder in practice by counsel. This drastic remedy may prove to be necessary in some cases, but we are reluctant to apply it now. The enforcement of both rules rests, primarily, upon the district judges, whose obligation we pointed out in Pittsburgh, C. C. & St. L. R. Co. v. Glinn, 208 Fed. 989, 126 C. C. A. 77, and we have no doubt that they will observe the new practice when approving a statement of evidence or bill of exceptions; but in equity appeals, if counsel overlook the rule and follow the old practice, the matter may not come to the attention of the trial judge. If such cases occur, the clerk who makes return to the appeal should not include the evidence in full, and his due attention will usually prevent informality in this respect. In those instances, however, where the record reaches this court containing the evidence in full, we think general Equity Rule 76 provides a remedy which, at least during the transition in the general practice, will be sufficient. The reference in Rule 76 to 'any kindred rule' quite clearly applied to Rule 75. It is true that the offending solicitor in this situation is the solicitor for appellant, and that appellant pays, in the first instance, the entire cost of printing, so that if he is unsuccessful in this court, no disposition of the costs of printing can operate as a penalty, but if he is successful, he can be denied the recovery of such costs; and the further affirmative costs, contemplated by Rule 76, might, in a proper case, be imposed upon the offending solicitors." (222 Fed. 884 et seq.; 3 U. S. Comp. Stats. 1916, § 1536, p. 2528.)

As to Narrative Form of Statement.

In United States v. Motion Picture Patents Co., 230 Fed. 541, the court held that the district court could not approve a transcript of the record for transmission to the Supreme Court with-

out the statement in narrative form required by Rule 75, unless leave to omit such statement was obtained from the Supreme Court, as it would be an evasion of the duty imposed on the district court to apply the exception contained in the rule as to setting forth parts of the testimony in full to the whole testimony.

See, also, Louisville & N. R. Co. v. United States, 238 U. S. 1, 10, 59 **L. Ed.** 1177, 1180, 35 Sup. Ct. 696.

Deportation Proceedings.

On an appeal in deportation proceedings the evidence should be brought up by a certificate of the evidence under Equity Rule 75, rather than by a common-law bill of exceptions. (Wong Keow v. United States (7th Cir.), 215 Fed. 95, 131 C. C. A. 403.)

Illustration of Statement of Evidence Under Rule 75.

United States District Court, Southern District of California, Southern Division.

In Equity—No. ——.

K. Company, Plaintiff, v. Frank Doe et al., Defendants. } STATEMENT OF EVIDENCE UNDER EQUITY RULE 75.

Plaintiff offered in evidence copy of letters patent No. ——, dated ——, 19—, as "Plaintiff's Exhibit 1."

It was stipulated that plaintiff was and is a corporation as alleged in the bill of complaint.

Testimony of K., for Plaintiff.

K., called on behalf of plaintiff, duly sworn, testifies:

I am 38 years of age, reside in ——, Cal., and a manufacturer of irrigation appliances for sixteen years past; I am the inventor named in "Plaintiff's Exhibit 1" [etc.].

This making of cement joints is not a new thing, no, not very new; I have been at it for the last ten years.

As to the holding power of cement on iron for ordinary pressure, it is all right; it is good; we made cement joints eight or nine years ago, and they are still in the ground yet.

On Cross-examination.

On our cast-iron pipe ends there is generally a bead, and the other end is a bell and spigot end. There is what we call a "lead lock." Inside the bell there is a sort of groove running around on the inside of the bell, a groove that lead will run into. I cannot remember any particular place within the last eight or ten years where this construction was used [etc.].

Q. Did you ever put a valve with a flange shape like that on the end of a pipe? [Indicating device.]

A. How do you mean? This would be on the valve, do you mean?

Q. Yes, put your pipe on the inside here, have a flange in this shape.

A. No, I never did.

Q. Would you think that would hold if it were placed on the end of a pipe and filled in with cement here a half an inch thick?

Q. (By the Court.) Do you think it would hold under pressure?

A. Well, your Honor, it would depend how much pressure would be on that pipe. There is an awful short space there for material to hold there. . . .

§ 1672. Printing and Filing of Record on Appeal and Error to Circuit Courts of Appeal.

Paragraph 1, Act. Feb. 13, 1911, c. 147. "That in any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to, or writ of error from, a United States circuit court of appeals the appellant or plaintiff in error shall cause to be printed under such rules as the lower court shall prescribe, and shall file in the office of the clerk of such circuit court of appeals at least twenty days before the case is called for argument therein, at least twenty-five printed transcripts of the record of the lower court, and of such part or abstract of the proofs as the rules of such circuit court of appeals may require, and in such form as the Supreme Court of the United States shall by rule prescribe, one of which printed transcripts shall be certified under the hand of the clerk of the lower court and under the seal thereof, and shall furnish three copies of such printed transcript to the adverse party at least twenty days before such argument: *Provided,* That either the court below or the circuit court of appeals may order any original document or other evidence to be sent up in addition to the printed copies of the record or in lieu of printed copies of a part thereof; and no written or typewritten transcript of the record shall be required." (6 Fed. Stats. Ann., 2d ed., p. 180; 3 U. S. Comp. Stats. 1916, § 1656.)

§ 1673. Printing and Filing of Record on Appeal and Error to Supreme Court—Use of Record in Circuit Court of Appeals as Part of Transcript.

Paragraph 2, Act Feb. 13, 1911, c. 47. "That in any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to or by writ of error or of *certiorari* from the Supreme Court of the United States, in which the record has been printed and used upon the hearing in the court below and which substantially conforms to the printed record in said Supreme Court, if there have been at the time of filing the record in the court below twenty-five copies of said printed record, in addition to those provided in the preceding section, lodged with the clerk of the court below, one copy thereof shall be used by the clerk of the court below in the preparation and as a part of the transcript of the record of the court below; and no fee shall be allowed the clerk of the court below in the preparation of the transcript for such part thereof as is included in said printed record so lodged with him. And the clerk of the court below, in transmitting the transcript of record to the Supreme Court of the United States for review, shall at the same time transmit the remaining uncertified copies of the printed record so lodged with him, which shall be used in the preparation and as a part of the printed record in the Supreme Court of the United States, and the clerk's fee for preparing the record for the printer, indexing the same, supervising the printing, and binding and distributing the copies, shall be at such rate per folio thereof, exclusive of the printed record so furnished by the clerk of the court below, as the Supreme Court of the United States may from time to time by rule prescribe; and no written or typewritten transcript of so much of the record as shall have been printed as herein provided shall be required." (36 Stats. 901; 6 Fed. Stats. Ann., 2d ed., p. 182; 3 U. S. Comp. Stats. 1916, § 1657.)

§ 1674. One Record Sufficient When Both Parties Appeal to Supreme Court Direct.

§ *1013, Rev. Stats.* "Where appeal is duly taken by both parties from the judgment or decree of a circuit or district court to the Supreme Court, a transcript of the record filed in

the Supreme Court by either appellant may be used on both appeals, and both shall be heard thereon in the same manner as if records had been filed by the appellants in both cases." (6 Fed. Stats. Ann., 2d ed., p. 180; 3 U. S. Comp. Stats. 1916, § 1655.)

§ 1675. Time for Return of Appeals and Writs of Error.

Supreme Court Rule 8, Subd. 5. "All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day, except in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Montana, Arizona, Wyoming, North Dakota, South Dakota, Alaska, Idaho, Hawaii, and Porto Rico, when the time shall be extended to sixty days, and from the Philippine Islands to one hundred twenty days." (2 U. S. Comp. Stats. 1916, p. 1813.)

C. C. A. Rule 14, Subd. 5. "All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day." (2 U. S. Comp. Stats. 1916, p. 1294.)

§ 1676. Summary of Procedure on Appeal and Error. In all appeals, whether from the district courts to the circuit courts of appeal, or from the district courts direct to the Supreme Court, or from the circuit courts of appeal to the Supreme Court in those cases where such appeals may be taken, the following steps must be taken in order to get the record into the appellate court:

First. Except in cases of appeal allowed in open court or writs of error taken and allowed in open court at the term during which judgment was rendered at the time when the decree appealed from was rendered, a petition for appeal (or writ of error) in writing must be addressed to the lower court, or, if in vacation, to the judge thereof.

Second. With this petition there must be filed an assignment of errors.

Third. The allowance of the appeal must be indorsed upon the petition by the justice or judge of the lower court, or a separate order allowing the appeal or the order allowing the writ of error must be signed by him.

Fourth. Before the appeal can be perfected a satisfactory bond on appeal must be furnished by the appellant, which bond may act as a *supersedeas* if desired. This bond may be given either at the time when the appeal is allowed, or within a reasonable time thereafter, and must be approved by the justice or judge allowing the appeal, and by no one else. The same applies to writs of error.

Fifth. The citation or notice of appeal, in cases where it is required, must be signed by the judge and served upon the appellee. So, also, as to allowance of the writ of error.

Sixth. The writ of error must be issued either by the clerk of the district court, the circuit court of appeals, or the Supreme Court, as the case may be.

All of these papers and proceedings are filed with the clerk of the court below, and constitute a part of the record on appeal.

§ 1677. Review of Final Decisions of Circuit Courts of Appeals upon Certiorari.

Part § 240, Jud. Code. "In any case, civil or criminal, in which the judgment or decree of a circuit court of appeals is made final by the provisions of this title, it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." (36 Stats. 1157; 5 Fed. Stats. Ann., 2d ed., p. 854; 2 U. S. Comp. Stats. 1916, § 1217.)

See, also, § 4, Act Jan. 28, 1915, c. 22, as amended § 3, Act Sept. 6, 1916, c. 448, 38 Stats. 804, 39 Stats. 727, 5 Fed. Stats. Ann., 2d ed., p. 608, in note to § 128, Jud. Code; 2 U. S. Comp. Stats. 1916, § 1120a, pp. 1443, 1444.

Instructions as to applications for writs of *certiorari* under acts of March 3, 1891, and Sept. 6, 1916, by Honorable James D. Maher, Clerk of the Supreme Court of the United States, may be found in our Appendix immediately preceding the Supreme Court Rules.

The following forms are suggested:

[Title of Court.]

[Title of Cause.] PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The petition of —— respectfully shows to this honorable court [here state facts and proceedings numbered in separate paragraphs leading to and including the decree of the circuit court of appeals].

A certified copy of the entire record of said case in the said circuit court of appeals is hereby furnished, attached to and made a part of this application and marked exhibit "A" in compliance with Rule 37 of this honorable court.

Your petitioner is advised and believes that the said judgment of the United States circuit court of appeals in said case is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination in conformity with the provision in § 240, Judicial Code, said case being made final in said circuit court of appeals by the provision in § 128, Judicial Code.

The said case was decided in said circuit court of appeals [here set forth argument advanced against the decision of the circuit court of appeals and the reasons why it should be reviewed by the Supreme Court].

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States circuit court of appeals for the —— circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the said case, entitled —— v. ——, No. ——, to the end that the said case may be reviewed and determined by this court as provided by section 240, Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as this court may deem appropriate and in conformity with said provision of the Judicial Code and that the said judgment of the said circuit court of appeals in the said case and every part thereof may be reversed by this Honorable Court.

——, Petitioner.

[Verification.]

[Title of Court.]

[Title of Cause.] WRIT OF CERTIORARI.

United States of America,—ss.

The President of the United States of America, to the Honorable Judges of the United States Circuit Court for the —— Circuit, Greeting:

Being informed that there is now pending before you a suit in which —— is appellant [or plaintiff in error] and —— is appellee [or defendant in error], which suit was removed to said circuit court of appeals by virtue of an appeal [or a writ of error] from the district court of the United States for the —— district of ——; and we being willing for certain reasons, that the said cause and the record and proceedings therein should be certified by said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable ——, Chief Justice of the Supreme Court of the United States.

——, Clerk of the Supreme Court.

§ 1678. Certification by Circuit Courts of Appeals to Supreme Court.

Part § 239, Jud. Code. "In any case within its appellate jurisdiction . . . the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal." (36 Stats. 1157; 5 Fed. Stats. Ann., 2d ed., p. 838; 2 U. S. Comp. Stats. 1916, § 1216; Foster's Federal Practice, 5th ed., p. 2378; Simkins' Federal Equity Suit, 3d ed., pp. 735, 737.)

In view of the final clause of the section above quoted, the only difference in procedure upon a review of this class of cases is in

the manner of getting the questions before the Supreme Court, subsequent proceedings being the same as if the cause had been brought there by writ of error or appeal.

The form of the certificate is substantially as follows:

CERTIFICATE OF QUESTIONS BY CIRCUIT JUDGES TO THE SUPREME COURT.

The United States Circuit Court of Appeals for the —— Circuit.

[Title of Cause.]

Appeal from the District Court of the United States for the —— District of ——.

This cause coming on for hearing before the court after full argument, it is ordered, in view of the important questions arising with the record and the doubt which the court has as to the correct decision thereof that certain questions shall be certified to the Supreme Court of the United States for its instruction thereon, that accompanying said question there shall also be a statement from which such question can be fully understood; which question and the statement accompanying them are as follows:

[Questions and statements are here set forth.]

[To be signed by all judges.]

§ 1679. Appellate Procedure—District Courts of Alaska to the Supreme Court.

Part § 247, Jud. Code. "Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the district court for the district of Alaska or any division thereof, direct to the Supreme Court of the United States (in the cases enumerated) within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the district court to the Supreme Court." (36 Stats. 1158; 5 Fed. Stats. Ann., 2d ed., p. 905; 2 U. S. Comp. Stats. 1916, § 1224; Foster's Federal Practice, 5th ed., pp. 2388, 2437, 2456, 2539.)

This procedure is included within the first class of appeals enumerated in § 1650, *supra,* and the practice is the same as that in appeals from district courts direct to the United States Supreme Court, heretofore described.

§ 1680. Appellate Procedure—Hawaii and Porto Rico.

§ *246, Jud. Code, as amended* § *2, Act Jan. 28, 1915, c. 22.* "Writs of error and appeals from the final judgments and decrees of the Supreme Court of the Territory of Hawaii and of the Supreme Court of Porto Rico may be taken and prosecuted to the Supreme Court of the United States within the same time, in the same manner, under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a State in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven; and in all other cases, civil or criminal, in the Supreme Court of the Territory of Hawaii or the Supreme Court of Porto Rico, it shall be competent for the Supreme Court of the United States to require by *certiorari*, upon the petition of any party thereto, that the case be certified to it, after final judgment or decree, for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but *certiorari* shall not be allowed in any such case unless the petition therefor is presented to the Supreme Court of the United States within six months from the date of such judgment or decree." (36 Stats. 1158, as amended 38 Stats. 804; 5 Fed. Stats. Ann., 2d ed., p. 900; 2 U. S. Comp. Stats. 1916, § 1223, p. 1787.)

Part § *2, Act Jan. 28, 1915, c. 22.* "Writs of error and appeals from the final judgments and decrees of the supreme courts of the Territory of Hawaii and Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the value of $5,000, may be taken and prosecuted in the circuit courts of appeals." (38 Stats. 804; 6 Fed. Stats. Ann., 2d ed., p. 145.)

[Title of Trial Court and Cause.]

WRIT OF ERROR TO THE SUPREME COURT OF HAWAII.

The United States of America,—ss.

The President of the United States of America to the Supreme Court of the Territory of Hawaii, Greeting:

Because in the record and proceedings as also in the rendition of the judgment and decree which is in the said supreme court of the territory of Hawaii, before you or some of you, being the highest court of law or equity of said territory in which a decision could be had in the said suit, where was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States and the decision was against their validity; [or here state any other Federal question involved] a manifest error has happened to the great damage of ——, plaintiff in error herein, as by their assignment of errors appears, we being willing that error, if any there be, should be duly corrected, and full justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, so that you have the same at Washington within thirty days from the date hereof in the said Supreme Court to be then and there heard, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, if any there be, what of right should be done according to the laws of the United States.

Witness the Honorable ——, Chief Justice of the said Supreme Court, this —— day of ——, A. D. 19—.

——,

Clerk of the Supreme Court of the Territory of Hawaii.

[Seal of the Supreme Court, Title of Court and Cause.]

Allowed by

——,

Chief Justice of the Supreme Court of the Territory of Hawaii.

§ 1681. Appellate Procedure—From Supreme Court of Philippines.

Part § 248, Jud. Code. "Such final judgments or decrees (of the supreme court of the Philippine Islands in the cases enumerated in chapter 39) may and can be reviewed, reversed, modified, or affirmed by said supreme court on appeal or writ of error by the party aggrieved within the same time, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the district courts of the United States."

(36 Stats. 1158; 5 Fed. Stats. Ann., 2d ed., p. 908; Foster's Federal Practice, 5th ed., pp. 2391, 2456, 2539.)

The procedure upon appeal in these cases also falls within the first classification enumerated in § 1650, *supra.*

§ 1682. Appellate Procedure—From District of Columbia.

Part § 250, Jud. Code. "Writs of error and appeals (from final judgments or decrees of the court of appeals of the District of Columbia in the cases enumerated and discussed in § 2018 of chapter 39) shall be taken within the same time, in the same manner, and under the same regulation, as writs of error and appeals are taken from the circuit courts of appeals to the Supreme Court of the United States." (36 Stats. 1159; 5 Fed. Stats. Ann., 2d ed., p. 913; 2 U. S. Comp. Stats. 1916, § 1227; Foster's Federal Practice, 5th ed., pp. 1382, 1519, 2387, 2436, 2439, 2457.)

Appellate procedure in the cases covered by this section falls within the third class of appeals enumerated in § 1650, *supra,* and the discussion of that class of appeals applies to appellate procedure under this section.

§ 1683. Appellate Procedure—From District of Columbia, Where Decision of Circuit Court of Appeals is Otherwise Final.

§ 251, Jud. Code. "In any case in which the judgment or decree of said court of appeals is made final by the section last preceding, it shall be competent for the Supreme Court of the United States to require, by *certiorari* or otherwise, any such case to be certified to it for its review and determination with the same power and authority in the case as if it had been carried by writ of error or appeal to said Supreme Court. It shall also be competent for said court of appeals, in any case in which its judgment or decree is made final under the section last preceding, at any time to certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision; and thereupon the Supreme Court may either give its instruction on the question and propositions certified to it, which shall be binding upon said court

of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal." (36 Stats. 1159; 5 Fed. Stats. Ann., 2d ed., p. 917; 2 U. S. Comp. Stats. 1916, § 1228; Foster's Federal Practice, 5th ed., pp. 1520, 2379, 2387.)

The language of this section is substantially the same as that of §§ 239 and 240, Judicial Code, which apply to appeals from circuit courts of appeals of the various circuits to the Supreme Court, and the procedure under the above-quoted section is the same as that discussed under §§ 239, 240, Judicial Code in §§ 1677, 1678, *supra.*

§ 1684. Certiorari Ninth Circuit to Supreme Court in Alaska Cases.

Part § 134, Jud. Code (Drawn from § 202 of the Criminal Code of Alaska, and §§ 504 and 505 of the Civil Code of Alaska). "Whenever such circuit court of appeals (for the ninth circuit) may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such case, the court may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instruction shall be binding upon the circuit court of appeals." (36 Stats. 1134; 5 Fed. Stats. Ann., 2d ed., p. 644; 2 U. S. Comp. Stats. 1916, § 1125; Foster's Federal Practice, 5th ed., pp. 2411, 2437, 2539.)

The cases covered by this section are those in which appeals may be taken from district courts of Alaska to the circuit court of appeals for the ninth circuit, the decision of said circuit court of appeals being final except for the review by the Supreme Court as above provided. The language of the section is similar to that of § 239, Judicial Code, which provides for like procedure in all cases decided by the circuit courts of appeals of the various circuits, in which their judgments are otherwise final, and the effect

of the section above quoted is to provide the same procedure in this class of appeals from the district courts of Alaska, as is provided by § 239, Judicial Code, in parallel appeals from district courts of the United States.

§ 1685. Procedure After Transcript Reaches Appellate Court.

Part Sup. Ct. Rule 8, and Cir. Ct. App. Rule 14. "No case will be heard until a complete record containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed." (2 U. S. Comp. Stats. 1916, § 1232, p. 1813.)

This rule having been complied with the cause is docketed, heard, and decided in accordance with the rules of the particular appellate court to which the cause has been taken. It is not practicable in a manual of this size to here set forth at length the provisions of all these rules. They are contained in the Appendix, and to them the practitioner must refer for information as to docketing, printing, and filing of brief, time for argument, and all the details relating to the conduct of the appeal before the appellate tribunal.

§ 1686. No Reversal for Error in Fact.

§ *1011, Rev. Stats.* "There shall be no reversal in the Supreme Court or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact." (6 Fed. Stats. Ann., 2d ed., p. 230; 3 U. S. Comp. Stats. 1916, § 1672.)

§ 1687. Damages and Costs on Error.

§ *1010, Rev. Stats., Comp. Stats. 1901, p. 715, 4 F. S. A. 623.* "Where, upon writ of error, judgment is affirmed in the Supreme Court or a circuit court, the court shall adjudge to the respondent in error just damages for his delay, and single or double costs at its discretion." (6 Fed. Stats. Ann., 2d ed., p. 228; 3 U. S. Comp. Stats. 1916, § 1671.)

§ 1688. Dismissal of Appeal. Under the rules of the Supreme Court and the circuit courts of appeals, the appellee may secure the dismissal of an appeal upon any of the following grounds:

1. Transcript not properly filed or cause not docketed before return day named in citation. (Sup. Ct. Rule 9, C. C. A. Rule 16.)

2. Record not printed in time. (Sup. Ct. Rule 10, C. C. A. Rule 23.)

3. Nonappearance of counsel for appellant or failure to file brief. (Sup. Ct. Rule 16, C. C. A. Rule 22.)

4. Appearance not entered when case calls. (Sup. Ct. Rule 18, C. C. A. Rule 22.)

5. Requisite numbers of copies of brief not filed, or not filed in time. (Sup. Ct. Rule 21, C. C. A. Rule 24.)

6. By stipulation filed with clerk in vacation. (Sup. Ct. Rule 28, C. C. A. Rule 20.)

7. Neither party prepared to argue cause upon second call when called at two successive terms. (Sup. Ct. Rule 19.)

8. Failure of deceased appellants, representatives to appear. (C. C. A. Rule 19.)

In addition to the above-named grounds prescribed by the rules, the following, held by the courts sufficient to warrant dismissal, have been gathered together and set forth in Simkins' "A Federal Equity Suit" (3d ed.), chapter CIX, p. 720.

9. Appellant may dismiss by leave of court. (United States v. Griffith, 141 U. S. 212, 35 **L. Ed.** 719, 11 Sup. Ct. 1005.)

10. When it appears that further prosecution is collusive. (Mills v. Green, 159 U. S. 654, 40 **L. Ed.** 293, 16 Sup. Ct. 132; Benner v. Hayes, 80 Fed. 953, 26 C. C. A. 271; Weaver v. Kelley, 92 Fed. 421, 34 C. C. A. 423.)

11. When there is no material issue. (Allen v. Georgia, 166 U. S. 140, 41 **L. Ed.** 949, 17 Sup. Ct. 525.)

12. When the question is moot, or some abstract proposition. (Kimball v. Kimball, 174 U. S. 158, 43 **L. Ed.** 932, 19 Sup. Ct. 639; United States v. Evans, 213 U. S. 297, 53 **L. Ed.** 803, 29 Sup. Ct. 507; Mills v. Green, 159 U. S. 653, 40 **L. Ed.** 293, 16 Sup. Ct. 132.)

13. Where relief becomes impossible. (Mills v. Green, 159 U. S. 653, 40 **L. Ed.** 293, 16 Sup. Ct. 132; Flour Inspectors v. Glover, 160 U. S. 170, 40 **L. Ed.** 382, 16 Sup. Ct. 321; Katz v. San Antonio, 91 Fed. 567, 34 C. C. A. 10, 63 U. S. App. 452; Gamewell Fire Alarm Tel. Co. v. Municipal Signal Co., 77 Fed. 492, 23 C. C. A. 250, 33 U. S. App. 714; Lockwood v. Wickes, 75 Fed. 118, 21 C. C. A. 257, 36 U. S. App. 321, 40 U. S. App. 136, as when statutes repealed. Flour Inspectors v. Glover, 160 U. S. 170, 40 **L. Ed.** 382, 16 Sup. Ct. 321; Board of Flour Inspectors v. Glover, 161 U. S. 103, 40 **L. Ed.** 632, 16 Sup. Ct. 492.)

14. An appeal will be dismissed if no citation is sued out, or sued out and not served, but the regular appearance of appellee waives it. (Peace River Phosphate Co. v. Edwards, 70 Fed. 728, 17 C. C. A. 359, 30 U. S. App. 513; Freeman v. Clay, 48 Fed. 849, 1 C. C. A. 115, 2 U. S. App. 151.)

15. An appeal will be dismissed when based on grounds affecting the jurisdiction of the court *a quo*, or the jurisdiction of the appellate court, as when the appeal was not sued out within the time limited. (Gorman Wright Co. v. Wright, 134 Fed. 363–365, 67 C. C. A. 345; Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449–453, 44 **L. Ed.** 842–844, 20 Sup. Ct. 690; Waxahachie v. Coler, 92 Fed. 284, 34 C. C. A. 349.)

16. When decree joint, and appeal by one without notice to others. (Fitzpatrick v. Graham, 119 Fed. 353, 56 C. C. A. 95, and cases cited.)

17. When no assignment of errors or brief. (Moline Trust & Sav. Bank v. Wylie, 149 Fed. 734, 79 C. C. A. 440; Fitch v. Richardson, 147 Fed. 196, 77 C. C. A. 422.)

To procure the dismissal of an appeal, a written motion must be prepared and filed, and notice given in accordance with Supreme Court Rule 6, § 3, and Circuit Court of Appeals Rule 21, § 3.

The motion may be in the following form:

[Title of Court and Cause.]

MOTION TO DISMISS.

The appellee moves the court to dismiss the appeal filed herein for the following reasons:

1. Because, etc. [setting forth the facts upon which the motion is based].

——, Solicitor.

The appellant must receive notice of the motion, which may be served in the following form:

[Title of Court and Cause.]

To ——, Appellant, and ——, His Counsel:

Please take notice that the appellee will, on the —— day of ——, 19—, or as soon thereafter as counsel can be heard, submit to the above-entitled court at ——, his motion to dismiss the appeal now pending in this cause, a copy of which is attached to this notice.

——, Solicitor.

§ 1689. Diminution of Record. If the transcript is incomplete or defective, the proper practice is a suggestion of diminution of the record, which is done by motion or petition in writing in the appellate court.

> *Supreme Court Rule 14, C. C. A. Rule 18.* "No *certiorari* for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such *certiorari* must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay." (2 U. S. Comp. Stats. 1916, § 1232, p. 1821.)

The petition may be, substantially, as follows: (M. K. & T. Ry. Co. v. Dinsmore, 108 U. S. 30, 27 **L. Ed.** 640, 2 Sup. Ct. 9):

[Title of Court and Cause.]

PETITION FOR CERTIORARI FOR DIMINUTION OF RECORDS.

To the Honorable Justices of the Supreme Court of the United States:

The petition of —— respectfully shows to this honorable court as follows [here set forth the failure of the clerk in the lower court to incorporate in the record those proceedings for the lack of which the diminution is suggested, or whatever the circumstances are, which are responsible for the diminution]:

Wherefore your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States circuit court of appeals for the —— circuit [or whatever court the appeal may have been taken from], commanding the said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of all and every part of the record and proceedings of the said court in the said case therein entitled, —— v. ——, No. ——, remaining on file in the office of the clerk of the said court, and not embodied in the transcript on appeal in the said cause already filed in this court [or specify what parts of the record it is desired to have sent up].

——, Petitioner.

It seems that the motion or petition must be verified, unless the facts therein stated are admitted. (Chappell v. United States, 160 U. S. 499, 40 **L. Ed.** 510, 16 Sup. Ct. 397.)

§ 1690. Mandate. Mandate is the command of the appellate court, directing the lower court in its disposition of a cause after its determination upon appeal or writ of error.

It is issued by the clerk of the appellate court, in accordance with the rules of that court (C. C. A. Rule 32, Supreme Ct. Rule 24, § 5, and Rule 39, Appendix, *post*), and in form substantially as follows:

[Title of Court and Cause.]

WRIT OF MANDATE TO DISTRICT COURT ON REVERSAL.

United States of America,—ss.

The President of the United States of America, to the Honorable Judges of the District Court of the United States for the —— District of ——: Greeting.

[Seal of the U. S. Supreme Court.]

Whereas, lately in the district court of the United States for the —— district of——, before you, or some of you, in a cause between ——, appellant, and —— appellee, wherein the decree of such district court entered in said cause on the ——, day of ——, 19—, is in the following words, viz:

[Here set forth the decree *verbatim.*]

As by the inspection of the transcript of the record which was brought into the Supreme Court of the United States by virtue of an appeal taken by ——, according to the act of Congress in such case made and provided, fully appears.

And whereas, on the —— day of ——, 19—, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, on appeal, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged and decreed by this court that the decree of said district court in this cause be, and the same is hereby reversed, with costs to the original plaintiff, ——, against the defendant, ——. [Here set forth the decree of the Supreme Court.]

And it is further ordered that this cause be, and the same is hereby, remanded to the said district court for further proceedings in conformity with the opinion of this court.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and the decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable ——, Chief Justice of the United States, this —— day of ——, A. D. 19—.

——,

Clerk of the Supreme Court of the United States.

Upon receipt of the mandate by the lower court, nothing is left except for that court to carry it into execution. (Durrant v. Storrow, 101 U. S. 555, 25 **L. Ed.** 961; Great Northern R. Co. v. Western Union Tel. Co., 174 Fed. 321, 98 C. C. A. 193; In re Sanford Fork & Tool Co., 160 U. S. 247, 40 **L. Ed.** 414, 16 Sup. Ct. 291.) If, in executing the directions contained in the writ of mandate, either party believes that the lower court has misconstrued those directions, his remedy is by appeal or *mandamus.* (In re Blake, 175 U. S. 117, 44 **L. Ed.** 94, 20 Sup. Ct. 42; Metcalf v. Watertown, 68 Fed. 861, 16 C. C. A. 37; James v. Central Trust Co., 108 Fed. 931, 47 C. C. A. 374.)

In such appeals the original judgment is not reviewable, the only question being as to the proper compliance with the directions contained in the writ of mandate. (United States v. Camou, 184 U. S. 572, 46 **L. Ed.** 694, 22 Sup. Ct. 505.)

If the writ of mandate is clear, leaving nothing to the discretion of the lower court, and the action of that court does not con-

form to the mandate, the proper remedy is not appeal, but *mandamus*. (In re Sanford Fork & Tool Co., 160 U. S. 247, 40 **L. Ed.** 414, 16 Sup. Ct. 291; Mason v. Pewabic Min. Co., 153 U. S. 361, 38 **L. Ed.** 745, 14 Sup. Ct. 847; In re Blake, 175 U. S. 117, 44 **L. Ed.** 94, 20 Sup. Ct. 42.)

§ 1691. Death of Party After Judgment, but Before Appeal. Prior to the act of March 3, 1875, it was the practice, upon the death of a party after judgment had been rendered, and before the time for taking an appeal had elapsed, to apply to the court below for an order reviving the suit in the name of the representative of the deceased. (McClane v. Boone, 6 Wall. 246, 18 **L. Ed.** 836.)

Section 9 of that act, however, made all formal revival proceedings unnecessary, the representative of the deceased being merely required to file a certified copy of his appointment. § 297, Judicial Code, repeals the act of Mar. 3, 1875, and furnishes no substitute for it. Consequently the old practice of formally applying for revivor in the name of the representative of the deceased is again necessary.

§ 1692. Death of a Party During Appellate Proceedings. When appellate proceedings are pending in the Supreme Court and either party dies, Rule 15 of the Supreme Court Rules makes provision for what shall be done. These rules are set out in Appendix, *post*, and the rule cited may also be found 2 U. S. Comp. Stats. 1916, § 1232, p. 1822.

The death of a party pending appellate proceedings to the circuit court of appeals is provided for in Rule 19 of the 1st, 2d, 4th, 5th, 7th, 8th and 9th circuits, and Rule 21 in the 3d circuit and Rule 16 in the 6th circuit. These rules are set out in Appendix.

§ 1693. Mistake as to Proper Method of Review not Ground for Dismissal. § 4, Act Sept. 6, 1916, c. —, provides that a mistake in the proper method of taking an appeal shall not cause a dismissal, but the court shall take the action that would be appropriate if proper appellate procedure had been followed. (39 Stats. 727; Fed. Stats. Ann., 2d ed., Pamphlet Sup. No. 8, "Judiciary"; 3 U. S. Comp. Stats. 1916, § 1649a, p. 3275.)

CHAPTER 76.

MISCELLANEOUS PROVISIONS.

SEC.

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§ 1700. Construction of Code.

§ *292, Jud. Code.* "Wherever, in any law not contained within this act, a reference is made to any law revised or embraced herein, such reference, upon the taking effect hereof, shall be construed to refer to the section of this act into which has been carried or revised the provision of law to which reference is so made." (36 Stats. 1167; 5 Fed. Stats. Ann. 2d ed., p. 1084; 2 U. S. Comp. Stats. 1916, § 1269.)

§ *293, Jud. Code.* "The provisions of sections one to five, both inclusive, of the Revised Statutes (§ 1701, below), shall apply to and govern the construction of the provisions of this act. The words 'this title,' wherever they occur herein, shall be construed to mean this act." (36 Stats. 1167; 5 Fed. Stats. Ann., 2d ed., p. 1084; 2 U. S. Comp. Stats. 1916, § 1272.)

§ *294, Jud. Code.* "The provisions of this act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest." (36 Stats. 1167; 5 Fed. Stats. Ann., 2d ed., p. 1084; 2 U. S. Comp. Stats. 1916, § 1271; Simkins' Federal Equity Suit, 3d ed., p. 42.)

§ *295, Jud. Code.* "The arrangement and classification of the several sections of this act have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapter under which any particular section is placed." (36 Stats. 1167; 5 Fed. Stats. Ann., 2d ed., p. 1085; 2 U. S. Comp. Stats. 1916, § 1272.)

§ 1701. Definitions.

§§ *1–5, Rev. Stats.* "§ 1. In determining the meaning of the Revised Statutes, or of any act or resolution of Congress passed subsequent to February twenty-fifth, eighteen hundred and seventy-one, words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular; words

importing the masculine gender may be applied to females; the words 'insane person' and 'lunatic' shall include every idiot, *non compos,* lunatic, and insane person; the word 'person' may extend and be applied to partnerships and corporations, and the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense; and a requirement of an 'oath' shall be deemed complied with by making affirmation in judicial form.

"§ 2. (County.) The word 'county' includes a parish, or any other equivalent subdivision of a state or territory of the United States.

"§ 3. (Vessel.) The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

"§ 4. (Vehicle.) The word 'vehicle' includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land.

"§ 5. (Company, association.) The word 'company' or 'association,' when used in reference to a corporation, shall be deemed to embrace the words 'successors and assigns of such company or association,' in like manner as if these last-named words, or words of similar import, were expressed." (Fed. Stats. Ann., 2d ed., title "Statutes"; 1 U. S. Comp. Stats. 1916, §§ 1–5.)

§ 1702. Priority of Revenue Cases or Where State a Party.

§ *949, Rev. Stats.* "When a state is a party, or the execution of the revenue laws of a state is enjoined or stayed, in any suit in a court of the United States, such state or the party claiming under the revenue laws of a state, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient reason, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties." (6 Fed. Stats. Ann., 2d ed., p. 92; 3 U. S. Comp. Stats. 1916, § 1581.)

§ 1703. Suits Under Revenue and Postal Laws, etc., Brought in Name of United States.

§ *919, Rev. Stats.* "All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes, and all suits arising under the postal laws, shall be brought in the name of the United States." (6 Fed. Stats. Ann., 2d ed., p. 79; 3 U. S. Comp. Stats. 1916, § 1545.)

§ 1704. District Attorney's Prosecution of Fraud on the Revenue.

§ *838, Rev. Stats.* "It shall be the duty of every district attorney to whom any collector of customs, or of internal revenue, shall report, according to law, any case in which any fine, penalty, or forfeiture has been incurred in the district of such attorney for the violation of any law of the United States relating to the revenue, to cause the proper proceedings to be commenced and prosecuted without delay, for the fines, penalties, and forfeitures, in such case provided, unless, upon inquiry and examination, he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that such proceedings should be instituted; in which case he shall report the facts in customs cases to the Secretary of the Treasury, and in internal revenue cases to the Commissioner of Internal Revenue for their direction. And for the expenses incurred and services rendered in all such cases, the district attorney shall receive and be paid from the Treasury such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of: *Provided,* That the annual compensation of such district attorney shall not exceed the maximum amount prescribed by law, by reason of such allowance and payment." (4 Fed. Stats. Ann., 2d ed., p. 761; 2 U. S. Comp. Stats. 1916, § 1297.)

§ 1705. Warrants for Searches and Seizures Under Customs Laws.

§ *3066, Rev. Stats.* "If any collector, naval officer, surveyor, or other person specially appointed by either of them or inspector shall have cause to suspect a concealment of any merchandise in any particular dwelling-house, store-building, or other place, they, or either of them, upon proper application on oath to any justice of the peace, or district judge of cities, police justice, or any judge of the circuit or district court of the United States, or any Commissioner of the United States circuit court, shall be entitled to a warrant to enter such house, store, or other place, in the daytime only, and there to search for such merchandise; and if any shall be found, to seize and secure the same for trial; and all such merchandise, upon which the duties shall not have been paid, or secured to be paid, shall be forfeited." (2 Fed. Stats. Ann., 2d ed., p. 1163; 6 U. S. Comp. Stats. 1916, § 5769.)

§ 1706. Procedure in Seizure Cases Under Customs Laws.

§ *923, Rev. Stats.* "When any vessel, goods, wares, or merchandise are seized by any officer of the customs, and prosecuted for forfeiture by virtue of any law respecting the revenue, or the registering and recording, or the enrolling and licensing of vessels, the court shall cause fourteen days' notice to be given of such seizure and libel, by causing the substance of such libel, with the order of the court thereon, setting forth the time and place appointed for trial, to be inserted in some newspaper published near the place of seizure, and by posting up the same in the most public manner for the space of fourteen days, at or near the place of trial; and proclamation shall be made in such manner as the court shall direct. And if no person appears and claims such vessel, goods, wares, or merchandise, and gives bond to defend the prosecution thereof and to respond the cost in case he shall not support his claim, the court shall proceed to hear and determine the cause according to law." (3 Fed. Stats. Ann., 2d ed., p. 324; 3 U. S. Comp. Stats. 1916, § 1549.)

§ 1707. Bailing Property Seized Under Customs Laws.

§ *938, Rev. Stats.* "Upon the prayer of any claimant to the court, that any vessel, goods, wares, or merchandise, seized and prosecuted under any laws respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing of vessels, or any part thereof, should be delivered to him, the court shall appoint three proper persons to appraise such property, who shall be sworn in open court, or before a commissioner appointed by the district court to administer oaths to appraisers, for the faithful discharge of their duty; and the appraisement shall be made at the expense of the party on whose prayer it is granted. If, on the return of the appraisement, the claimant, with one or more sureties, to be approved by the court, shall execute a bond to the United States for the payment of a sum equal to the sum at which the property prayed to be delivered is appraised, and produce a certificate from the collector of the district where the trial is had, and of the naval officer thereof, if any there be, that the duties on the goods, wares, and merchandise, or tonnage duty on the vessel so claimed, have been paid or secured in like manner as if the same had been legally entered, the court shall, by rule, order such vessel, goods, wares, or merchandise to be delivered to such claimant; and the said bond shall be lodged with the proper officer of the court. If judgment passes in favor of the claimant, the court shall cause the said bond to be canceled; but if judgment passes against the claimant, as to the whole or any part of such vessel, goods, wares, or merchandise, and the claimant does not within twenty days thereafter pay into the court, or to the proper officer thereof, the amount of the appraised value of such vessel, goods, wares, or merchandise so condemned, with the costs, judgment shall be granted upon the bond, on motion in open court, without further delay." (3 Fed. Stats. Ann., 2d ed., p. 325; 3 U. S. Comp. Stats. 1916, § 1564.)

§ 1708. Property Taken Under Revenue Laws Irrepleviable.

§ *934, Rev. Stats.* "All property taken or detained by any officer or other person, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law and subject only to the orders

and decrees of the courts of the United States having jurisdiction thereof." (Fed. Stats. Ann., 2d ed., "Replevin"; 3 U. S. Comp. Stats. 1916, § 1560.)

§ 1709. Credits Allowed in Government Suits Against Individuals.

§ *951, Rev. Stats.* "In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident." (2 Fed. Stats. Ann., 2d ed., p. 211; 3 U. S. Comp. Stats. 1916, § 1588.)

§ 1710. Credits Allowed in Government Suits Under Postal Laws.

§ *952, Rev. Stats.* "No claim for a credit shall be allowed upon the trial of any suit for delinquency against a postmaster, contractor, or other officer, agent, or employee of the Postoffice Department, unless the same has been presented to the sixth auditor and by him disallowed, in whole or in part, or unless it is proved to the satisfaction of the court that the defendant is, at the time of trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting to the said auditor a claim for such credit by some unavoidable accident." (2 Fed. Stats. Ann., 2d ed., p. 215; 3 U. S. Comp. Stats. 1916, § 1589.)

§ 1711. Interest in Postal Suits on Balances Due.

§ *964, Rev. Stats.* "In all suits for balances due to the Postoffice Department, interest thereon shall be recovered, from the time of the default, at the rate of six per centum a year." (Fed. Stats. Ann., 2d ed., "Postoffice Department"; 3 U. S. Comp. Stats. 1916, § 1602.)

§ 1712. Sale After Condemnation Under Revenue Laws.

§ *939, Rev. Stats.* "All vessels, goods, wares, or merchandise which shall be condemned by virtue of any law respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing of vessels, and for which bonds shall not have been given by the claimant, shall be sold by the marshal or other proper officer of the court in which condemnation shall be had, to the highest bidder, at public auction, by order of such court, and at such place as the court may appoint, giving at least fifteen days' notice (except in cases of perishable merchandise) in one or more of the public newspapers of the place where such sale shall be; or if no paper is published in such place, in one or more of the papers published in the nearest place thereto; for which advertising, a sum not exceeding five dollars shall be paid. And the amount of such sales, deducting all proper charges, shall be paid within ten days after such sale by the person selling the same to the clerk or other proper officer of the court directing such sale, to be by him, after deducting the charges allowed by the court, paid to the collector of the district in which such seizure or forfeiture has taken place, as hereinbefore directed." (3 Fed. Stats. Ann., 2d ed., p. 326; 3 U. S. Comp. Stats. 1916, § 1565.)

§ 1713. Paying Money into Court.

§ *995, Rev. Stats.* "All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court: *Provided,* That nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court." (6 Fed. Stats. Ann., 2d ed., p. 631; 3 U. S. Comp. Stats. 1916, § 1644.)

§ 1714. Withdrawal of Money Paid into Court.

§ *996, Rev. Stats. as amended Act March 3, 1911, c. 224.* "No money deposited as aforesaid shall be withdrawn except

by order of the judge or judges of said court, respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn.

"In every case in which the right to withdraw money so deposited has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, it shall be the duty of the judge or judges of said court, or its successor, to cause such money to be deposited in the Treasury of the United States, in the name and to the credit of the United States: *Provided,* That any person or persons or any corporation or company entitled to any such money may, on petition to the court from which the money was received, or its successor, and upon notice to the United States attorney and full proof of right thereto, obtain an order of court directing the payment of such money to the claimant, and the money deposited as aforesaid shall constitute and be a permanent appropriation for payments in obedience to such orders, and this act is applicable to all money deposited in the Treasury of the United States in accordance with section nine hundred and ninety-six, Revised Statutes of the United States, as amended February nineteenth, eighteen hundred and ninety-seven." (36 Stats. 1083; 6 Fed. Stats. Ann., 2d ed., p. 632; 3 U. S. Comp. Stats. 1916, § 1645.)

§ 1715. Liens on Vessels for Repairs, Supplies or Other Necessaries—Procedure in Rem.

§§ *1–5, Act June 23, 1910, c. 373.* "(Maritime lien on vessels for repairs, supplies, etc.) That any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding *in rem,* and it shall not be necessary to allege or prove that credit was given to the vessel." (36 Stats. 604, 605; Fed. Stats. Ann., 2d ed., "Shipping and Navigation"; 7 U. S. Comp. Stats. 1916, § 7783, p. 8229.)

§ 2. "(Persons presumed to have authority.) That the following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel." (Fed. Stats. Ann., 2d ed., "Shipping and Navigation"; 7 U. S. Comp. Stats. 1916, § 7784, p. 8237.)

§ 3. "(Charterers, etc.) That the officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel, but nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor." (Fed. Stats. Ann., 2d ed., "Shipping and Navigation"; 7 U. S. Comp. Stats. 1916, § 7785.)

§ 4. "(Waiving lien — other proceedings not affected.) That nothing in this act shall be construed to prevent a furnisher of repairs, supplies, or other necessaries from waiving his right to a lien at any time, by agreement or otherwise, and this act shall not be construed to affect the rules of law now existing either in regard to the right to proceed against a vessel for advances or in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed *in personam*." (Fed. Stats. Ann., 2d ed., "Shipping and Navigation"; 7 U. S. Comp. Stats. 1916, § 7786.)

§ 5. "(State laws superseded.) That this act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings *in rem* against vessels for repairs, supplies, and other necessaries." (Fed. Stats. Ann., 2d ed., "Shipping and Navigation"; 7 U. S. Comp. Stats. 1916, § 7787.)

§ 1721. Limitation on Suits by Alien Enemy.

Part § 7 (*b*), *Act Oct. 6, 1917, c.* —. "Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof: *Provided, however,* That an enemy or ally of enemy licensed to do business under this Act may prosecute and maintain any such suit or action so far as the same arises solely out of the business transacted within the United States under such license and so long as such license remains in full force and effect: *And provided further,* That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him.

"Receipt of notice from the President to the effect that he has reasonable ground to believe that any person is an enemy or ally of enemy shall be *prima facie* defense to any one receiving the same, in any suit or action at law or in equity brought or maintained, or to any right or set-off or recoupment asserted by, such person and based on failure to complete or perform since the beginning of the war any contract or other obligation. In any prosecution under section sixteen hereof, proof of receipt of notice from the President to the effect that he has reasonable cause to believe that any person is an enemy or ally of enemy shall be *prima facie* evidence that the person receiving such notice has reasonable cause to believe such other person to be an enemy or ally of enemy within the meaning of section three hereof." (Pamphlet Supp. Fed. Stats. Ann., 2d ed., No. 12, p. 129, "Trading With the Enemy"; U. S. Comp. Stats. 1916, Adv. Sheets 244, Fed. No. 4, Supp., p. 446.)

§ 1722. Suits by Enemy Against Licensee Relative to Patents, Trademarks, Prints, Labels and Copyrights Under Trading With the Enemy Act.

§ *10* (*f*), *Act Oct. 6, 1917, c.* —. "The owner of any patent, trademark, print, label, or copyright under which a license is granted hereunder may, after the end of the war and until the expiration of one year thereafter, file a bill in

equity against the licensee in the district court of the United States for the district in which the said licensee resides, or, if a corporation, in which it has its principal place of business (to which suit the Treasurer of the United States shall be made a party), for recovery from the said licensee for all use and enjoyment of the said patented invention, trademark, print, label, or copyrighted matter: *Provided, however,* That whenever suit is brought, as above, notice shall be filed with the alien property custodian within thirty days after date of entry of suit: *Provided further,* That the licensee may make any and all defenses which would be available were no license granted. The court on due proceedings had may adjudge and decree to the said owner payment of a reasonable royalty. The amount of said judgment and decree, when final, shall be paid on order of the court to the owner of the patent from the fund deposited by the licensee, so far as such deposit will satisfy said judgment and decree; and the said payment shall be in full or partial satisfaction of said judgment and decree, as the facts may appear; and if, after payment of all such judgments and decrees, there shall remain any balance of said deposit, such balance shall be repaid to the licensee on order of the alien property custodian. If no suit is brought within one year after the end of the war, or no notice is filed as above required, then the licensee shall not be liable to make any further deposits, and all funds deposited by him shall be repaid to him on order of the alien property custodian. Upon entry of suit and notice filed as above required, or upon repayment of funds as above provided, the liability of the licensee to make further reports to the President shall cease.

"If suit is brought as above provided, the court may, at any time, terminate the license, and may, in such event, issue an injunction to restrain the licensee from infringement thereafter, or the court, in case the licensee, prior to suit, shall have made investment of capital based on possession of the license, may continue the license for such period and upon such terms and with such royalties as it shall find to be just and reasonable." (Pamphlet Supp. Fed. Stats. Ann., 2d ed., No. 12, p. 133; title "Trading With the Enemy.")

§ 1723. Same—Against Others Than Licensee.

§ *10 (g), Act Oct. 6, 1917, c. —.* [*Suits by enemy, etc., against infringers of patents, trademarks, etc.—Decree—Injunction.*] "Any enemy, or ally of enemy, may institute and prosecute suits in equity against any person other than a licensee under this Act to enjoin infringement of letters patent, trade-mark, print, label, and copyrights in the United States owned or controlled by said enemy or ally of enemy, in the same manner and to the extent that he would be entitled so to do if the United States was not at war: *Provided,* That no final judgment or decree shall be entered in favor of such enemy or ally of enemy by any court except after thirty days' notice to the alien property custodian. Such notice shall be in writing and shall be served in the same manner as civil process of Federal courts." (Pamphlet Supp. Fed. Stats. Ann., 2d ed., No. 12, p. 134, "Trading With the Enemy.")

§ 1724. Action on Claim Against Bureau War Risk Insurance.

§ *405, Act Oct. 6, 1917, c. —.* [*Actions on claims—Parties—Jurisdiction — Judgment — Attorney's fees—Compensation or fees prohibited—Penalty.*] "That in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides. The court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed ten per centum of the amount recovered, to be paid by the claimant on behalf of whom such proceedings are instituted to his attorney and it shall be unlawful for the attorney or for any other person acting as claim agent or otherwise to ask for, contract for, or receive any other compensation because of such action. No other compensation or fee shall be charged or received by any person except such as may be authorized by the commissioner in regulations to be promulgated by him. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for each and every such offense, be fined not exceeding $500,

or be imprisoned at hard labor not exceeding two years, or both, in the discretion of the court." (Pamphlet Supp. Fed. Stats. Ann., No. 12, p. 165, "War Department, etc.")

§ 1725. Jurisdiction of Prosecutions Under Act for National Security and Defense Production, Conservation and Distribution of Food Products and Fuel.

§ 7, Act Aug. 10, 1917, c. —. "That whenever any necessaries shall be hoarded as defined in section six they shall be liable to be proceeded against in any district court of the United States within the district where the same are found and seized by a process of libel for condemnation, and if such necessaries shall be adjudged to be hoarded they shall be disposed of by sale in such manner as to provide the most equitable distribution thereof as the court may direct, and the proceeds thereof, less the legal costs and charges, shall be paid to the party entitled thereto. The proceedings of such libel cases shall conform as near as may be to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States. It shall be the duty of the United States attorney for the proper district to institute and prosecute any such action upon presentation to him of satisfactory evidence to sustain the same." (Pamphlet Supp. Fed. Stats. Ann. No. 12, p. 23, "Food Products and Fuel.")

§ 1726. Civil Action Under Liquor Laws of District of Columbia for Injuries by Intoxicated Person or in Consequence of Intoxication.

§ 19, Act March 3, 1917, c. 165. "Every wife, child, parent guardian, or employer, or other person who shall be injured in person or property or means of support by any intoxicated person, or in consequence of intoxication, habitual or otherwise, of any person, such wife, child, parent, or guardian shall have a right of action, in his or her own name, against any person who shall, by selling or bartering intoxicating liquors, have caused the intoxication of such person, for all damages actually sustained, as well as for exemplary damages; and a

married woman shall have the right to bring suit, prosecute, and control the same, and the amount recovered the same as if unmarried; and all damages recovered by a minor under this Act shall be paid either to such minor or to his or her parents, guardian, or next friend, as the court shall direct." (U. S. Comp. Stats. 1916, § 3369n, Advance Sheets, 239 Fed. No. 2, Supp., p. 126.)

§ 1727. Condemnation Proceedings — Land for Military Purposes.

Act of July 2, 1917, c. —. [*Fortifications, coast defenses and military training camps—Condemnation of land.*] "That hereafter the Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, and military training camps, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided,* That when the owner of such land, interest or rights pertaining thereto shall fix a price for the same, which, in the opinion of the Secretary of War, shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay: *Provided further,* That the Secretary of War is hereby authorized to accept on behalf of the United States donations of land and the interest and rights pertaining thereto required for the above-mentioned purposes: *And provided further,* That when such property is acquired in time of war or the imminence thereof upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes, and the provision of section three hundred and fifty-five of the Revised Statutes, providing that no public money shall be expended upon such land until the written opinion of the Attorney Gen-

eral shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land is located has been given, shall be, and the same are hereby, suspended during the period of the existing emergency." (Pamphlet Supp. Fed. Stats. Ann., No. 12, p. 112, "Public Property, Buildings and Grounds.")

§ 1728. Condemnation Proceedings for Harbor Improvements.

§ 9, *Act Aug. 8, 1917, c. —.* [*Land or easements needed in work of harbor improvement—Procurement—Condemnation proceedings.*] "That whenever any State, or any reclamation, flood control or drainage district, or other public agency created by any State, shall undertake to secure any land or easement therein, needed in connection with a work of river and harbor improvement duly authorized by Congress, for the purpose of conveying the same to the United States free of cost, and shall be unable for any reason to obtain the same by purchase and acquire a valid title thereto, the Secretary of War may, in his discretion, cause proceedings to be instituted in the name of the United States for the acquirement by condemnation of said land or easement, and it shall be the duty of the Attorney General of the United States to institute and conduct such proceedings upon the request of the Secretary of War: *Provided,* That all expenses of said proceedings and any award that may be made thereunder shall be paid by such State, or reclamation, flood control or drainage district, or other public agency as aforesaid, to secure which payment the Secretary of War may require such State, or reclamation, flood control or drainage district, or other public agency as aforesaid, to execute a proper bond in such amount as he may deem necessary before said proceedings are commenced." (Pamphlet Supp. Fed. Stats. Ann., No. 12, p. 116, "Rivers, Harbors and Canals.")

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THE JUDICIAL CODE.

CHAPTER ONE.

DISTRICT COURTS—ORGANIZATION.

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23. Districts having more than one judge; division of business.

§ 1. (As amended Act July 30, 1914, c. 216.) In each of the districts described in chapter five there shall be a court called a district court, for which there shall be appointed one judge, to be called a district judge, except that in the northern district of California, the southern district of California, the northern district of Illinois, the district of Minnesota, the district of Nebraska, the district of New Jersey, the eastern district of New York, the northern and southern districts of Ohio, the district of Oregon, the eastern and western districts of Pennsylvania, and the western district of Washington, there shall be an additional district judge in each, and in the southern district of New York three additional district judges: Provided, That there shall be one judge for the eastern and western districts of South Carolina, one judge for the eastern and middle districts of Tennessee, and one judge for the northern and southern districts of Mississippi: Provided further, That the district judge for the middle district of Alabama shall continue as heretofore to be a district judge for the northern district thereof. Every district judge shall reside in the dis-

trict or one of the districts for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor. (38 Stats. 580.)

Provisions as to additional judges in the southern district of Georgia, district of New Jersey, eastern district of Pennsylvania, eastern and western districts of South Carolina, and western district of Texas will be found under the states referred to respectively under §§ 77, 96, 103, 105 and 108, *post*.

§ 2. Each of the district judges shall receive a salary of six thousand dollars a year, to be paid in monthly installments. (36 Stats. 1087. Superseding act of Feb. 12, 1903, c. 547, 32 Stats. 825, and § 554, Rev. Stats., which are repealed by § 297, Jud. Code.)

§ 3. (Re-enactment of § 555, Rev. Stats.) A clerk shall be appointed for each district court by the judge thereof, except in cases otherwise provided for by law. (36 Stats. 1087; 4 Fed. Stats. Ann., 2d ed., p. 817; 1 U. S. Comp. Stats. 1916, § 970.)

§ 4. (Superseding § 558, Rev. Stats.) Except as otherwise specially provided by law, the clerk of the district court for each district may, with the approval of the district judge thereof, appoint such number of deputy clerks as may be deemed necessary by such judge, who may be designated to reside and maintain offices at such places of holding court as the judge may determine. Such deputies may be removed at the pleasure of the clerk appointing them, with the concurrence of the district judge. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk, in his name, until a clerk is appointed and qualified; and for the default or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties on his official bond shall be liable; and his executor or administrator shall have such remedy for any such default or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime. (36 Stats. 1087; 4 Fed. Stats. Ann., 2d ed., p. 817; 1 U. S. Comp. Stats. 1916, § 971, p. 536.)

§ 5. (Formerly § 715, Rev. Stats.) The district court for each district may appoint a crier for the court; and the marshal may appoint such number of persons, not exceeding five, as the judge may determine, to wait upon the grand and other juries, and for other necessary purposes. (36

Stats. 1088; 4 Fed. Stats. Ann., 2d ed., p. 819; 1 U. S. Comp. Stats. 1916, § 972, p. 537.)

§ 6. (Re-enactment of § 562, Rev. Stats.) The records of a district court shall be kept at the place where the court is held. When it is held at more than one place in any district and the place of keeping the records is not specially provided by law, they shall be kept at either of the places of holding the court which may be designated by the district judge. (36 Stats. 1088; 4 Fed. Stats. Ann., 2d ed., p. 819; 1 U. S. Comp. Stats. 1916, § 973, p. 537.)

§ 7. (Re-enacting § 573, Rev. Stats.) No action, suit, proceeding, or process in any district court shall abate or be rendered invalid by reason of any act changing the time of holding such court, but the same shall be deemed to be returnable to, pending, and triable in the terms established next after the return day thereof. (36 Stats. 1088; 4 Fed. Stats. Ann., 2d ed., p. 820; 1 U. S. Comp. Stats. 1916, § 974; McGlashan v. United States, 71 Fed. 434, 18 C. C. A. 172.)

§ 8. (Re-enacting § 746, Rev. Stats.) When the trial or hearing of any cause, civil or criminal, in a district court has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; but the court may proceed therein and bring it to a conclusion in the same manner and with the same effect as if another stated term of the court had not intervened. (36 Stats. 1088; 4 Fed. Stats. Ann., 2d ed., p. 820; 1 U. S. Comp. Stats. 1916, § 975.)

It has been held that a trial is commenced when the term ends, although a full jury has not been impaneled. United States v. Loughery, 13 Blatchf. 267, 26 Fed. Cas. No. 15,631.

§ 9. The district courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court. (36 Stats. 1088; 4 Fed. Stats. Ann., 2d ed., p. 821; 1 U. S. Comp. Stats. 1916, § 976.)

Re-enacting § 574, Rev. Stats. Same as Equity Rule 1, omitting the words "as courts of admiralty and." McDowell v. United States, 159 U. S. 596, 600, 40 L. Ed. 271, 273, 16 Sup. Ct. 111; Central Trust Co. v. Sheffield & Birmingham Coal, I. R. Co., 60 Fed. 9; Butler v. United States, 87 Fed. 655. In general, United States v. Finnell, 185 U. S. 236, 46 L. Ed. 890, 22 Sup. Ct. 633; United States v. Marvin, 212 U. S. 275, 53 L. Ed. 510, 29 Sup. Ct. 297.

§ 10. (Re-enacting without change, Rev. Stats. § 578.) District courts shall hold monthly adjournments of their regular terms, for the trial of criminal causes, when their business requires it to be done, in order to prevent undue expenses and delays in such cases. (36 Stats. 1088; 4 Fed. Stats. Ann., 2d ed., p. 825; 1 U. S. Comp. Stats. 1916, § 977.)

In general, Pitman v. United States, 45 Fed. 159. Adjournment may be after prior adjournment by the judge. Clerk entitled to fees for attendance on day of adjournment.

§ 11. (Re-enacting § 581, Rev. Stats.) A special term of any district court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, and at such time and upon such notice as may be ordered by the district judge. Any business may be transacted at such special term which might be transacted at a regular term. (36 Stats. 1088; 4 Fed. Stats. Ann., 2d ed., p. 825; 1 U. S. Comp. Stats. 1916, § 978.)

Butler v. United States, 87 Fed. 655; United States v. Kessel, 63 Fed. 433. Orders made in chambers. United States v. The Schooner Little Charles, 1 Brock. (U. S.) 380, 26 Fed. Cas. No. 15,613. In general. American Railroad Co. of Porto Rico v. Castro, 204 U. S. 453, 51 L. Ed. 564, 27 Sup. Ct. 466; Goll v. United States, 151 Fed. 412, 80 C. C. A. 642.

§ 12. (Re-enacting § 583, Rev. Stats.) If the judge of any district court is unable to attend at the commencement of any regular, adjourned, or special term, or any time during such term, the court may be adjourned by the marshal, or clerk, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct. (36 Stats. 1088; 4 Fed. Stats. Ann., 2d ed., p. 825; 1 U. S. Comp. Stats. 1916, § 979.)

§ 13. (Combining § 591, Rev. Stats.; 34 Stats. 1417, and amendment thereto, which are repealed by § 297, Jud. Code.) When any district judge is prevented, by any disability, from holding any stated or appointed term of his district court, and that fact is made to appear by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, any

such circuit judge or justice may, if in his judgment the public interests so require, designate and appoint the judge of any other district in the same circuit to hold said court, and to discharge all the judicial duties of the judge so disabled, during such disability. Whenever it shall be certified by any such circuit judge or, in his absence, by the circuit justice of the circuit in which the district lies, that for any sufficient reason it is impracticable to designate and appoint a judge of another district within the circuit to perform the duties of such disabled judge, the chief justice may, if in his judgment the public interests so require, designate and appoint the judge of any district in another circuit to hold said court and to discharge all the judicial duties of the judge so disabled, during such disability. Such appointment shall be filed in the clerk's office, and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court, shall be transmitted by the clerk to the judge so designated and appointed. (36 Stats. 1089; 4 Fed. Stats. Ann., 2d ed., p. 826; 1 U. S. Comp. Stats. 1916, § 980.)

Filing the paper is not necessary to the validity of the appointment of the judge. National Home of Soldiers v. Butler (C. C.), 33 Fed. 374, see also The Alaska (C. C.), 35 Fed. 555, 557. This power does not extend to the case of a vacancy. 9 Op. Atty. Gen. 131. See § 603, Rev. Stats. Appointment not subject to collateral attack. Ball v. United States, 140 U. S. 118, 35 L. Ed. 377, 11 Sup. Ct. 761. Appointee may extend time for filing return to writ of error. Hall v. McKinnon, 193 Fed. 572, 113 C. C. A. 440. Acts of designated judge. McDowell v. United States, 159 U. S. 596, 40 L. Ed. 271, 16 Sup. Ct. 111. May v. United States, 199 Fed. 53, 117 C. C. A. 431; Cheesman v. Hart (C. C.), 42 Fed. 98; Gay v. Hudson River El. Power Co. (C. C.), 190 Fed. 812.

§ 14. (Drawn from § 592, Rev. Stats., 36 Stats. 1089, which section is repealed by § 297, Jud. Code.) When, from the accumulation or urgency of business in any district court, the public interests require the designation and appointment hereinafter provided, and the fact is made to appear, by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may designate and appoint the judge of any other district in the same circuit to have and exercise within the district first named the same powers that are vested in the judge thereof. Each of the said district judges may, in case of such appointment, hold separately at the same time a district court in such district, and discharge all the judicial duties of the district judge therein. (36 Stats. 1089; 4 Fed. Stats. Ann., 2d ed., p. 828; 1 U. S. Comp. Stats. 1916, § 981.)

In general, McDowell v. United States, 159 U. S. 596, 40 L. Ed. 271, 16 Sup. Ct. 111. Not subject to collateral attack. Ex parte United States,

226 U. S. 420, 57 L. Ed. 281, 33 Sup. Ct. 170. See In re Manning, 139 U. S. 504, 35 L. Ed. 264, 11 Sup. Ct. 624; Ball v. United States, 140 U. S. 118, 35 L. Ed. 377, 11 Sup. Ct. 761. McDowell v. United States, 159 U. S. 596, 40 L. Ed. 271, 16 Sup. Ct. 111. As to filing of appointment, see National Home for Soldiers v. Butler, 33 Fed. 374.

§ 15. (Superseding § 593, Rev. Stats.) If all the circuit judges and the circuit justice are absent from the circuit, or are unable to execute the provisions of either of the two preceding sections, or if the district judge so designated is disabled or neglects to hold the court and transact the business for which he is designated, the clerk of the district court shall certify the fact to the Chief Justice of the United States, who may thereupon designate and appoint in the manner aforesaid the judge of any district within such circuit or within any other circuit; and said appointment shall be transmitted to the clerk and be acted upon by him as directed in the preceding section. (36 Stats. 1089; 4 Fed. Stats. Ann., 2d ed., p. 828; 1 U. S. Comp. Stats. 1916, § 982.)

§ 16. (Superseding § 593, Rev. Stats.) Any such circuit judge, or circuit justice, or the Chief Justice, as the case may be, may, from time to time, if in his judgment the public interests so require, make a new designation and appointment of any other district judge, in the manner, for the duties, and with the powers mentioned in the three preceding sections, and revoke any previous designation and appointment. (36 Stats. 1089; 4 Fed. Stats. Ann., 2d ed., p. 828; 1 U. S. Comp. Stats. 1916, § 983.)

§ 17. (Superseding § 596, Rev. Stats.) It shall be the duty of the senior circuit judge then present in the circuit, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section fourteen, the district judge of any judicial district within his circuit to hold a district court in the place or in aid of any other district judge within the same circuit. (36 Stats. 1098; 4 Fed. Stats. Ann., 2d ed., p. 829; 1 U. S. Comp. Stats. 1916, § 984.)

McDowell v. United States, 159 U. S. 596, 40 L. Ed. 271, 16 Sup. Ct. 111. Ball v. United States, 140 U. S. 118, 35 L. Ed. 377, 11 Sup. Ct. 761.

§ 18. (New. Amendment, Act October 3, 1913, c. 18.) Whenever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the Chief Justice, the public interest shall require, the said judge, or associate justice, or Chief Justice, shall designate and appoint any circuit judge of the circuit to hold said district court.

Whenever it shall be certified by the senior circuit judge of the second circuit, or, in his absence, by the circuit justice of said circuit, that on account of the accumulation or urgency of business in any district court in said circuit it is impracticable to designate and appoint a sufficient number of district judges in other districts within said circuit to relieve such accumulation or urgency of business, the Chief Justice may, if in his judgment the public interests so require, designate and appoint the judge of any district court in another circuit to hold a district court within said second circuit, and to have and exercise within said district to which he is so assigned the same powers that are vested in the judge thereof: *Provided,* That said judge so designated and appointed shall have consented, in writing, to such designation and appointment: *And provided further,* That the senior circuit judge of the circuit within which such judge so designated and appointed resides shall certify, in writing, that the business of the district of such judge will not suffer thereby. Such appointment shall be filed in the clerk's office and entered on the minutes of said district court, and a certified copy thereof, under the seal of the court, shall be transmitted by the clerk to the judge so designated and appointed. Each of said district judges may, in case of such appointment, hold separately, at the same time, a district court in such district, and discharge all of the judicial duties of the district judge therein. (38 Stats. 203; 4 Fed. Stats. Ann., 2d ed., p. 829; 1 U. S. Comp. Stats. 1916, § 985.)

§ 19. (Drawn from § 595, Rev. Stats.) It shall be the duty of the district or circuit judge who is designated and appointed under either of the six preceding sections, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district. (36 Stats. 1090; 4 Fed. Stats. Ann., 2d ed., p. 830; 1 U. S. Comp. Stats. 1916, § 986.)

§ 20. (Superseding § 601, Rev. Stats.) Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are

provided in section fourteen. (36 Stats. 1090; 4 Fed. Stats. Ann., 2d ed., p. 831; 1 U. S. Comp. Stats. 1916, § 987.)

§ 21. (New legislation.) Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action. (36 Stats. 1090; 4 Fed. Stats. Ann., 2d ed., p. 832; 1 U. S. Comp. Stats. 1916, § 988.)

In general, Glascow v. Moyer, 225 U. S. 420, 56 L. Ed. 1147, 32 Sup. Ct. 753. The mere filing of the affidavit does not disqualify the judge. Ex parte N. K. Fairbanks Co., 194 Fed. 978.

§ 22. (Re-enacting § 602, Rev. Stats.) When the office of judge of any district court becomes vacant, all process, pleadings, and proceedings pending before such court shall, if necessary, be continued by the clerk thereof until such times as a judge shall be appointed, or designated to hold such court; and the judge so designated, while holding such court, shall possess the powers conferred by, and be subject to the provisions contained in, section nineteen. (36 Stats. 1090; 4 Fed. Stats. Ann., 2d ed., p. 837; 1 U. S. Comp. Stats. 1916, § 989.)

In general, Ball v. United States, 140 U. S. 118, 35 L. Ed. 377, 11 Sup. Ct. 761.

§ 23. (Drawn from Act of Feb. 20, 1907, c. 2073, § 2; Act of March 2, 1907, c. 2575, § 2, 34 Stats. 1253; Act of March 2, 1909; and the Act of Feb. 24, 1910, c. 56, § 3, 36 Stats. 202.) In districts having more than one district judge, the judges may agree upon the division of business and

assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district. (36 Stats. 1090; 4 Fed. Stats. Ann., 2d ed., p. 838; 1 U. S. Comp. Stats. 1916, § 990. Concurrent authority of judges. In re Steele, 156 Fed. 853; In re Steele, 162 Fed. 694.)

CHAPTER TWO.

DISTRICT COURTS—JURISDICTION.

SEC.
24. Original jurisdiction.
Par. 1. Where the United States are plaintiffs; and of civil suits at common law or in equity.
2. Of crimes and offenses.
3. Of admiralty causes, seizures, and prizes.
4. Of suits under any law relating to the slave trade.
5. Of cases under internal revenue, customs, and tonnage laws.
6. Of suits under postal laws.
7. Of suits under the patent, the copyright, and the trademark laws.
8. Of suits for violation of interstate commerce laws.
9. Of penalties and forfeitures.
10. Of suits on debentures.
11. Of suits for injuries on account of acts done under laws of the United States.
12. Of suits concerning civil rights.
13. Of suits against persons having knowledge of conspiracy, etc,
14. Of suits to redress the deprivation, under color of law, of civil rights.

SEC.
24. Original jurisdiction—Cont'd.
Par. 15. Of suits to recover certain offices.
16. Of suits against national-banking associations.
17. Of suits by aliens for torts.
18. Of suits against consuls and vice-consuls.
19. Of suits and proceedings in bankruptcy.
20. Of suits against the United States.
21. Of suits for the unlawful inclosure of public lands.
22. Of suits under immigration and contract-labor laws.
23. Of suits against trusts, monopolies, and unlawful combinations.
24. Of suits concerning allotments of land to Indians.
25. Of partition suits where United States is joint tenant.
25. Appellate jurisdiction under Chinese-exclusion laws.
26. Appellate jurisdiction over Yellowstone National Park.
27. Jurisdiction of crimes on Indian reservations in South Dakota.

§ 24. The district courts shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: Provided, however, That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.

Second. Of all crimes and offenses cognizable under the authority of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any state; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize. (As amended § 1, Act Oct. 6, 1917, c. ——; Pamphlet Supp. Fed. Stats. Ann. No. 12, p. 85.)

Fourth. Of all suits arising under any law relating to the slave trade.

Fifth. Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the court of customs appeals.

Sixth. Of all cases arising under the postal laws.

Seventh. Of all suits at law or in equity arising under the patent, the copyright, and the trade-mark laws.

Eighth. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the commerce court.

Ninth. Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States.

Tenth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

Eleventh. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several states.

Twelfth. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, Revised Statutes.

Thirteenth. Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, Revised Statutes, are about to be done, and, having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act.

Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

Fifteenth. Of all suits to recover possession of any office, except that of elector of President or Vice-President, Representative in or Delegate to Congress, or member of a state legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude; *Provided*, That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the states.

Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title "National Banks," Revised Statutes, to

enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located.

Seventeenth. Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States.

Eighteenth. Of all suits against consuls and vice consuls.

Nineteenth. Of all matters and proceedings in bankruptcy.

Twentieth. Concurrent with the court of claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court: *Provided,* however, That nothing in this paragraph shall be construed as giving to either the district courts or the court of claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: And provided further, That no suit against the government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: Provided, That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall

not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

Twenty-first. Of proceedings in equity, by writ of injunction, to restrain violations of the provisions of laws of the United States to prevent the unlawful inclosure of public lands; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure.

Twenty-second. Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws.

Twenty-third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

Twenty-fourth. Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty.

And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands now or heretofore held by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency: Provided, That the right of appeal shall be allowed to either party as in other cases. (37 Stats. 46.)

Twenty-fifth. Of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situate. (4 Fed. Stats. Ann., 2d ed., p. 838.)

§ 25. The district courts shall have appellate jurisdiction of the judgments and orders of United States commissioners in cases arising under the Chinese exclusion laws.

§ 26. The district court for the district of Wyoming shall have jurisdiction of all felonies committed within the Yellowstone National Park and appellate jurisdiction of judgments in cases of conviction before the commissioner authorized to be appointed under section five of an act entitled "An Act to Protect the Birds and Animals in Yellowstone National

Park, and to Punish Crimes in said Park, and for Other Purposes," approved May seventh, eighteen hundred and ninety-four.

§ 27. The district court of the United States for the district of South Dakota shall have jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, or assault with a dangerous weapon, committed within the limits of any Indian reservation in the state of South Dakota.

CHAPTER THREE.

DISTRICT COURTS—REMOVAL OF CAUSES.

SEC.
28. Removal of suits from state to United States district courts.
29. Procedure for removal.
30. Suits under grants of land from different states.
31. Removal of causes against persons denied any civil rights, etc.
32. When petitioner is in actual custody of state court.
33. Suits and prosecutions against revenue officers, etc.
34. Removal of suits by aliens.
35. When copies of records are refused by clerk of state court.
36. Previous attachment bonds, orders, etc., remain valid.
37. Suits improperly in district court may be dismissed or remanded.
38. Proceedings in suits removed.
39. Time for filing record; return of record, how enforced.

§ 28. Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any state court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. And where a suit is now pending,

or may hereafter be brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause: Provided, That if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any district court, or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said state court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in said state court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed. Provided, That no case arising under an act entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any state court of competent jurisdiction, shall be removed to any court of the United States.

"*And provided further,* That no suit brought in any State court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce, approved February fourth, eighteen hundred and

eighty-seven, as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine and June eighteenth, nineteen hundred and ten shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000." (36 Stats. 1094, as amended by 38 Stats. 278, 5 Fed. Stats. Ann., 2d ed., p. 16.)

§ 29. Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the grounds of prejudice or local influence, may desire to remove such suit from a state court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such state court at the time, or at any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court.

§ 30. If in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state and the matter in dispute exceeds the sum or value of three thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim, and shall rely upon, a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the

loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial. If he or they inform the court that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this chapter, remove the cause for trial to the district court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.

§ 31. When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the state courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the state court. It shall be the duty of the clerk of the state court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the district court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the district court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of

said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the district court, as herein provided, a certificate, under the seal of the district court, stating such failure, shall be given, and upon the production thereof in said state court the cause shall proceed therein as if no petition for removal had been filed.

§ 32. When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said state court, it shall be the duty of the clerk of said district court to issue a writ of *habeas corpus cum causa,* and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said district court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said state court a duplicate copy of said writ.

§ 33. That when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer, or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House, the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner: Said petitions shall set forth the nature of the suit or prosecution and be verified by affidavit and, together with a certificate signed

by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced or of the United States stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the district court and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpœna, petition, or any other process except capias, the clerk of the district court shall issue a writ of *certiorari* to the State court requiring it to send to the district court the record and the proceedings in the cause. When it is commenced by capias or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of *habeas corpus cum causa,* a duplicate of which shall be delivered to the clerk of the State court or left at his office by the marshal of the district or his deputy or by some other person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court, and any further proceedings, trial, or judgment therein in the State court shall be void. If the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa,* to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the district court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the district court that no copy of the record and proceedings therein in the State court can be obtained, the district court may allow and require the plaintiff to proceed *de novo* and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said district court. On failure of the plaintiff so to proceed, judgment of *non prosequitur* may be rendered against him, with costs for the defendant.

§ 34. Whenever a personal action has been or shall be brought in any state court by an alien against any citizen of a state who is, or at the time the alleged action accrued was, a civil officer of the United States, being a nonresident of that state wherein jurisdiction is obtained by the

state court, by personal service of process, such action may be removed into the district court of the United States in and for the district in which the defendant shall have been served with the process, in the same manner as now provided for the removal of an action brought in a state court by the provisions of the preceding section.

§ 35. In any case where a party is entitled to copies of the records and proceedings in any suit or prosecution in a state court, to be used in any court of the United States, if the clerk of said state court, upon demand, and the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court of the United States in which such records and proceedings are needed may, on proof by affidavit that the clerk of said state court has refused or neglected to deliver copies thereof, on demand as aforesaid, direct such record to be supplied by affidavit or otherwise, as the circumstances of the case may require and allow; and thereupon such proceeding, trial, and judgment may be had in the said court of the United States, and all such process awarded, as if certified copies of such records and proceedings had been regularly before the said court.

§ 36. When any suit shall be removed from a state court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

§ 37. If in any suit commenced in a district court, or removed from a state court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially invoke a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss

the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

§ 38. The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said state court prior to its removal.

§ 39. In all causes removable under this chapter, if the clerk of the state court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall, on conviction thereof in the district court of the United States to which said action or proceeding was removed, be fined not more than one thousand dollars, or imprisoned not more than one year, or both. The district court to which any cause shall be removable under this chapter shall have power to issue a writ of *certiorari* to said state court commanding such state court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this chapter for the removal of the same, and enforce said writ according to law. If it shall be impossible for the parties or persons removing any cause under this chapter, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said state court refuses to furnish a copy, on payment of legal fees, or for any other reason, the district court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty, as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said district court shall require the other party to plead, and said action or proceeding shall proceed to final judgment. The said district court may make an order requiring the parties thereto to plead *de novo;* and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

CHAPTER FOUR.

DISTRICT COURTS—MISCELLANEOUS PROVISIONS.

SEC.
40. Capital cases; where triable.
41. Offenses on the high seas, etc., where triable.
42. Offenses begun in one district and completed in another.
43. Suits for penalties and forfeitures, where brought.
44. Suits for internal-revenue taxes, where brought.
45. Seizures, where cognizable.
46. Capture of insurrectionary property, where cognizable.
47. Certain seizures cognizable in any district into which the property is taken.
48. Jurisdiction in patent cases.
49. Proceedings to enjoin Comptroller of the Currency.
50. When a part of several defendants cannot be served.
51. Civil suits; where to be brought.
52. Suits in states containing more than one district.
53. Districts containing more than one division; where suit to be brought; transfer of criminal cases.
54. Suits of a local nature, where to be brought.
55. When property lies in different districts in same state.
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SEC.
57. Absent defendants in suits to enforce liens, remove clouds on titles, etc.
58. Civil causes may be transferred to another division of district by agreement.
59. Upon creation of new district or division, where prosecution to be instituted or action brought.
60. Creation of new district, or transfer of territory not to divest lien; how lien to be enforced.
61. Commissioners to administer oaths to appraisers.
62. Transfer of records to district court when a territory becomes a state.
63. District judge shall demand and compel delivery of records of territorial court.
64. Jurisdiction of district courts in cases transferred from territorial courts.
65. Receivers to manage property according to state laws.
66. Suits against receiver.
67. Certain persons not to be appointed or employed as officers of courts.
68. Certain persons not to be masters or receivers.

§ 40. The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience.

§ 41. The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought.

§ 42. When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, deter-

mined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.

§ 43. All pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found.

§ 44. Taxes accruing under any law providing internal revenue may be sued for and recovered either in the district where the liability for such tax occurs or in the district where the delinquent resides.

§ 45. Proceedings on seizures made on the high seas, for forfeiture under any law of the United States, may be prosecuted in any district into which the property so seized is brought and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided.

§ 46. Proceedings for the condemnation of any property captured, whether on the high seas or elsewhere out of the limits of any judicial district, or within any district, on account of its being purchased or acquired, sold or given, with intent to use or employ the same, or to suffer it to be used or employed, in aiding, abetting, or promoting any insurrection against the government of the United States, or knowingly so used or employed by the owner thereof, or with his consent, may be prosecuted in any district where the same may be seized, or into which it may be taken and proceedings first instituted.

§ 47. Proceedings on seizures for forfeiture of any vessel or cargo entering any port of entry which has been closed by the President in pursuance of law, or of goods and chattels coming from a state or section declared by proclamation of the President to be in insurrection into other parts of the United States, or of any vessel or vehicle conveying such property, or conveying persons to or from such state or section, or of any vessel belonging, in whole or in part, to any inhabitant of such state or section, may be prosecuted in any district into which the property so seized may be taken and proceedings instituted; and the district court thereof shall have as full jurisdiction over such proceedings as if the seizure was made in that district.

§ 48. In suits brought for the infringement of letters patent the district courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or cor-

poration, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpœna upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought.

§ 49. All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located.

§ 50. Where there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and nonjoinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit.

§ 51. Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

§ 52. When a state contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the state, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate

writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same state.

§ 53. When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division. All mesne and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district, or if the state contains more than one district, then in any of such districts, as provided in the preceding section. All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division to which the cause is so ordered transferred; and thereupon the cause shall be proceeded with in said division in the same manner as if the offense had been committed therein. In all cases of the removal of suits from the courts of a state to the district court of the United States such removal shall be to the United States district court in the division in which the county is situated from which the removal is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of the United States courts, shall be deemed to refer to the terms of the United States district court in such division.

§ 54. In suits of a local nature, where the defendant resides in a different district, in the same state, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides.

§ 55. Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in the district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted.

§ 56. Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different states in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days thereafter, by the circuit court of appeals for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing and entering in the district court for each district of the circuit in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and of the order of appointment. The disapproval of such appointment within such thirty days, or the failure to file such certified copy of the bill and order of appointment within ten days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the state in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be.

§ 57. When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to, real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publica-

tion of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same state, such suit may be brought in either district in said state: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

§ 58. Any civil cause, at law or in equity, may, on written stipulation of the parties or of their attorneys of record signed and filed with the papers in the case, in vacation or in term, and on the written order of the judge signed and filed in the case in vacation or on the order of the court duly entered of record in term, be transferred to the court of any other division of the same district, without regard to the residence of the defendants, for trial. When a cause shall be ordered to be transferred to a court in any other division, it shall be the duty of the clerk of the court from which the transfer is made to carefully transmit to the clerk of the court to which the transfer is made the entire file of papers in the cause and all documents and deposits in his court pertaining thereto, together with a certified transcript of the records of all orders, interlocutory decrees, or other entries in the cause; and he shall certify, under the seal of the court, that the papers sent are all which are on file in said court belonging to the cause; for the performance of which duties said clerk so transmitting and certifying shall receive the same fees as are now allowed by law for similar services, to be taxed in the bill of costs, and regularly collected with the other costs in the cause; and such transcript, when so certified and received, shall henceforth constitute a part of the record of the cause in the court to which the transfer shall be made. The clerk receiving such transcript and original papers shall

file the same and the case shall then proceed to final disposition as other cases of a like nature.

§ 59. Whenever any new district or division has been or shall be established, or any county or territory has been or shall be transferred from one district or division to another district or division, prosecutions for crimes and offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the cause to be removed to the new district or division for trial. Civil actions pending at the time of the creation of any such district or division, or the transfer of any such county or territory, and arising within the district or division so created or the county or territory so transferred, shall be tried in the district or division as it existed at the time of the institution of the action, or in the district or division so created, or to which the county or territory is or shall be so transferred, as may be agreed upon by the parties, or as the court shall direct. The transfer of such prosecutions and actions shall be made in the manner provided in the section last preceding.

§ 60. The creation of a new district or division, or the transfer of any county or territory from one district or division to another district or division, shall not affect or divest any lien theretofore acquired in the circuit or district court by virtue of a decree, judgment, execution, attachment, seizure, or otherwise, upon property situated or being within the district or division so created, or the county or territory so transferred. To enforce any such lien, the clerk of the court in which the same is acquired, upon the request and at the cost of the party desiring the same, shall make a true and certified copy of the record thereof, which, when so made and certified, and filed in the proper court of the district or division in which such property is situated or shall be, after such transfer, shall constitute the record of such lien in such court, and shall be evidence in all courts and places equally with the original thereof; and thereafter like proceedings shall be had thereon, and with the same effect, as though the cause or proceeding had been originally instituted in such court. The provisions of this section shall apply not only in all cases where a district or division is created, or a county or any territory is transferred by this or any future act, but also in all cases where a district or division has been created, or a county or any territory has been transferred by any law heretofore enacted.

§ 61. Any district judge may appoint commissioners, before whom appraisers of vessels or goods and merchandise seized for breaches of any law of the United States, may be sworn; and such oaths, so taken, shall be as effectual as if taken before the judge in open court.

§ 62 (Re-enacting § 567, Rev. Stats). When any territory is admitted as a state, and a district court is established therein, all the records of the proceedings in the several cases pending in the highest court of said territory at the time of such admission, and all records of the proceedings in the several cases in which judgments or decrees had been rendered in said territorial court before that time, and from which writs of error could have been sued out or appeals could have been taken, or from which writs of error had been sued out or appeals had been taken and prosecuted to the Supreme Court or to the circuit court of appeals, shall be transferred to and deposited in the district court for the said state. (36 Stats. 1104; Benner v. Porter, 50 U: S. 235, 13 L. Ed. 119, 9 How. (U. S.) 235.)

§ 63 (Re-enacting § 568, Rev. Stats.). It shall be the duty of the district judge, in the case provided in the preceding section, to demand of the clerk, or other person having possession or custody of the records therein mentioned, the delivery thereof, to be deposited in said district court; and in case of the refusal of such clerk or person to comply with such demand, the said district judge shall compel the delivery of such records by attachment or otherwise, according to law. (36 Stats. 1104; 5 Fed. Stats. Ann., 2d ed., p. 540; 1 U. S. Comp. Stats. 1916, § 1045, p. 1183.)

§ 64. When any territory is admitted as a state, and a district court is established therein, the said district court shall take cognizance of all cases which were pending and undetermined in the trial courts of such territory, from the judgments or decrees to be rendered in which writs of error could have been sued out or appeals taken to the Supreme Court or to the circuit court of appeals, and shall proceed to hear and determine the same.

§ 65. Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or

manager who shall willfully violate any provision of this section shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both.

§ 66. (Formerly § 3, Act Mch. 3, 1887, c. 373, as Amended Act Aug. 13, 1888, c. 866.) Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice.

§ 67 (Re-enacting § 7 of Act of Aug. 13, 1888, c. 866). No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to the judge of such court. (36 Stats. 1088; 5 Fed. Stats. Ann., 2d ed., p. 548; 1 U. S. Comp. Stats. 1916, § 1049. See Elgutter et al. v. Northwestern Mutual Life Ins. Co., 86 Fed. 500, 30 C. C. A. 218.)

Amendment Dec. 21, 1911, c. 4. "Provided, That no such person at present holding a position or employment in a circuit court shall be debarred from similar appointment or employment in the district court succeeding to such circuit court jurisdiction."

§ 68 (Re-enacting act of March 3, 1879, c. 183). No clerk of a district court of the United States or his deputy shall be appointed a receiver or master in any case, except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment. (36 Stats. 1105; 5 Fed. Stats. Ann., 2d ed., p. 548; 1 U. S. Comp. Stats. 1916, § 1050, p. 1220. In general, Briggs v. Neal et al., 120 Fed. 224, 56 C. C. A. 572.)

CHAPTER FIVE.

DISTRICT COURTS—DISTRICTS, AND PROVISIONS APPLICABLE TO PARTICULAR STATES.

SEC.
69. Judicial districts.
70. Alabama.
71. Arkansas.
72. California.
73. Colorado.
74. Connecticut.
75. Delaware.
76. Florida.
77. Georgia.
78. Idaho.
79. Illinois.
80. Indiana.
81. Iowa.
82. Kansas.
83. Kentucky.
84. Louisiana.
85. Maine.
86. Maryland.
87. Massachusetts.
88. Michigan.
89. Minnesota.
90. Mississippi.
91. Missouri.
92. Montana.
93. Nebraska.
94. Nevada.
95. New Hampshire.
96. New Jersey.
97. New York.
98. North Carolina.
99. North Dakota.
100. Ohio.
101. Oklahoma.
102. Oregon.
103. Pennsylvania.
104. Rhode Island.
105. South Carolina.
106. South Dakota.
107. Tennessee.
108. Texas.
109. Utah.
110. Vermont.
111. Virginia.
112. Washington.
113. West Virginia.
114. Wisconsin.
115. Wyoming.

§ 69. (Re-enacting § 297, Rev. Stats.) The United States are divided into judicial districts as follows: 36 Stats. 1105.

§ 70, as Amended Act Feb. 28, 1913, c. 89. (Drawn from § 532, Rev. Stats.) The state of Alabama is divided into three judicial districts, to be known as the northern, middle, and southern districts of Alabama. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Cullman, Jackson, Lawrence, Limestone, Madison, and Morgan, which shall constitute the northeastern division of said district; also the territory embraced on the date last mentioned in the counties of Colbert, Franklin, and Lauderdale, which shall constitute the northwestern division of said district; also the territory embraced on the date last mentioned in the counties of Cherokee, Dekalb, Etowah, Marshall, and Saint Clair, which shall constitute the middle division of said district; also the territory embraced on the date last mentioned in the counties of Blount, Jefferson, and Shelby, which shall constitute the southern division of said district; also the territory

embraced on the date last mentioned in the counties of Walker, Winston, Marion, Fayette, and Lamar, which shall constitute the Jasper division of said district; also the territory embraced on the date last mentioned in the counties of Calhoun, Clay, Cleburne, and Talladega, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Bibb, Greene, Pickens, Sumter, and Tuscaloosa, which shall constitute the western division of said district. Terms of the district court for the northeastern division shall be held at Huntsville on the first Tuesday in April and the second Tuesday in October; for the northwestern division, at Florence on the second Tuesday in February and the third Tuesday in October: Provided, That suitable rooms and accommodations for holding court at Florence shall be furnished free of expense to the government; for the middle division, at Gadsden on the first Tuesdays in February and August: Provided, That suitable rooms and accommodations for the holding court at Gadsden shall be furnished free of expense to the government; for the southern division, at Birmingham on the first Mondays in March and September, which courts shall remain in session for the transaction of business at least six months in each calendar year; for the Jasper division, at Jasper on the second Tuesdays in January and June; Provided, That suitable rooms and accommodations for holding court at Jasper shall be furnished free of expense to the government; for the eastern division, at Anniston on the first Mondays in May and November; and for the western division, at Tuscaloosa, on the first Tuesdays in January and June. The clerk of the court for the northern district shall maintain an office in charge of himself or a deputy at Anniston, at Florence, at Jasper, and at Gadsden, which shall be kept open at all times for the transaction of the business of said court. The district judge for the northern district shall reside at Birmingham. The middle district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Autauga, Barbour, Bullock, Butler, Chilton, Coosa, Covington, Crenshaw, Elmore, Lowndes, Montgomery, and Pike, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Coffee, Dale, Geneva, Henry, and Houston, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Chambers, Lee, Macon, Randolph, Russell, and Tallapoosa, which shall constitute the eastern division of said middle judicial district. Terms of the district court for the northern division shall be held at Montgomery on the first

Tuesdays in May and December; and for the southern division, at Dothan on the first Mondays in June and December and for the eastern division, at Opelika on the first Mondays in April and November: Provided, That suitable rooms and accommodations for holding court at Opelika shall be furnished free of expense to the government. The clerk of the court for the middle district shall maintain an office, in charge of himself or a deputy, at Dothan, and shall maintain an office in charge of himself or a deputy at Opelika, which said offices at Dothan and Opelika shall be kept open at all times for the transaction of the business of said divisions. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Baldwin, Choctaw, Clarke, Conecuh, Escambia, Mobile, Monroe, and Washington, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Dallas, Hale, Marengo, Perry, and Wilcox, which shall constitute the northern division of said district. Terms of the district court for the southern division shall be held at Mobile on the fourth Mondays in May and November; and for the northern division at Selma on the first Mondays in May and November. (5 Fed. Stats. Ann., 2d ed., p. 552; 2 U. S. Comp. Stats. 1916, § 1052.)

§ 71. (Drawn from § 533, Rev. Stats.) The state of Arkansas is divided into two districts, to be known as the eastern and western districts of Arkansas. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Sevier, Howard, Little River, Pike, Hempstead, Miller, Lafayette, Columbia, Nevada, Ouachita, Union, and Calhoun, which shall constitute the Texarkana division of said district; also the territory embraced on the date last mentioned in the counties of Polk, Scott, Yell, Logan, Sebastian, Franklin, Crawford, Washington, Benton, and Johnson, which shall constitute the Fort Smith division of said district; also the territory embraced on the date last mentioned in the counties of Baxter, Boone, Carroll, Madison, Marion, Newton, and Searcy, which shall constitute the Harrison division of said district. Terms of the district court for the Texarkana division shall be held at Texarkana on the second Mondays in May and November; for the Fort Smith division, at Fort Smith on the second Mondays in January and June; and for the Harrison division, at Harrison on the second Mondays in April and October. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Lee, Phillips, Saint Francis, Cross, Monroe, and Woodruff, which constitute the eastern division of said district;

also the territory embraced on the date last mentioned in the counties of Independence, Cleburne, Stone, Izard, Sharp, and Jackson, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Crittenden, Clay, Craighead, Greene, Mississippi, Poinsett, Fulton, Randolph, and Lawrence, which shall constitute the Jonesboro division of said district; and also the territory embraced on the date last mentioned in the counties of Arkansas, Ashley, Bradley, Chicot, Clark, Cleveland, Conway, Dallas, Desha, Drew, Faulkner, Garland, Grant, Hot Spring, Jefferson, Lincoln, Lonoke, Montgomery, Perry, Pope, Prairie, Pulaski, Saline, Van Buren, and White, which shall constitute the western division of said district. Terms of the district court for the eastern division shall be held at Helena on the second Monday in March and the first Monday in October; for the northern division, at Batesville on the fourth Monday in May and the second Monday in December; for the Jonesboro division, at Jonesboro on the second Mondays in May and November; and for the western division, at Little Rock on the first Monday in April and the third Monday in October. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Little Rock, at Helena, at Jonesboro, and at Batesville, which shall be kept open at all times for the transaction of the business of the court. And the clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Fort Smith, at Harrison, and at Texarkana, which shall be kept open at all times for the transaction of the business of the court. (5 Fed. Stats. Ann., 2d ed., p. 554; 2 U. S. Comp. Stats. 1916, § 1056.)

Act Sept. 9, 1914, c. 295. (Arkansas Judicial District—Terms of Court.) That hereafter the terms of the United States district court for the Jonesboro division of the eastern district of Arkansas shall be held at Jonesboro on the first Monday in May and the fourth Monday in November. (38 Stats. 713.)

(Act of March 4, 1915, c. 170.)

§ 1. (Arkansas eastern district—Eastern and western divisions—Boundaries changed.) That the counties of Desha and Chicot, in the State of Arkansas, be, and the same are hereby, detached from the western division of the eastern district of Arkansas and are hereby annexed to, included in, and made a part of the eastern division of the said eastern district of the State of Arkansas. (38 Stats. 1193; 5 Fed. Stats. Ann., 2d ed., p. 1091; 2 U. S. Comp. Stats. 1916, § 1056b.)

§ 2. (Western district made smaller.) That the county of Yell, in the State of Arkansas, be, and the same is hereby, detached from the Fort Smith division of the western district of Arkansas and is annexed to, included in, and made a part of the western division of the eastern district of the State of Arkansas. (38 Stats. 1193; 5 Fed. Stats. Ann., 2d ed., p. 1091; 2 U. S. Comp. Stats. 1916, § 1056c.)

§ 3. (Jurisdiction of pending cases.) That this Act shall in no wise affect the jurisdiction as to actions at law or suits in equity now pending, but all actions at law and suits in equity now pending in the respective districts and divisions having jurisdiction thereof at the time of the passage of this Act shall proceed as if this Act had not been passed. (38 Stats. 1193; 5 Fed. Stats. Ann., 2d ed., p. 1091.)

Act Oct. 3, 1913, c. 17, § 1. That the state of Arizona shall constitute one judicial district, to be known as the district of Arizona.

Sec. 2. That terms of the district court shall be held in Tucson on the first Mondays in May and November; at Phoenix on the first Mondays in April and October; at Prescott on the first Mondays in March and September; and at Globe on the first Mondays in June and December. Causes, civil and criminal, may be transferred by the court or judge thereof from any of the aforesaid places, where court shall be held in said district, to any of the places herein above mentioned in said district, when the convenience of the parties or the ends of justice would be promoted by the transfer; and any interlocutory order made by the court or judge thereof in any of the above-mentioned places. (5 Fed. Stats. Ann., 2d ed., p. 1090; 2 U. S. Comp. Stats. 1916, § 1054.)

§ 31. Act June 20, 1910, c. 310. (One judicial district—Attached to ninth circuit—Judicial officers.) That the said States, when admitted as aforesaid, shall constitute one judicial district, and the circuit and district courts of said district shall be held at the capital of said State, and the said district shall, for judicial purposes, be attached to the ninth judicial circuit. There shall be appointed for said district one district judge, one United States attorney, and one United States marshal. The judge of said district shall receive a yearly salary the same as other similar judges of the United States, payable as provided for by law, and shall reside in the district to which he is appointed. There shall be appointed clerks of said courts who shall keep their offices at the capital of said State. The regular terms of said courts shall be held on the first Monday in April and the first Monday in October of each year. The circuit and district courts for said district, and the judges thereof, respectively, shall possess the same powers and

jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. The marshal, district attorney, and the clerks of the circuit and district courts of said district, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States, and shall, for the services they perform, receive the fees and compensation now allowed by law to officers performing similar services for the United States in the Territory of Arizona. (36 Stats. 576; 5 Fed. Stats. Ann., 2d ed., p. 1090.)

§ 72. (Drawn from § 531, Rev. Stats.) The state of California is divided into two districts, to be known as the northern and southern districts of California. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced, and Tulare, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura, which shall constitute the southern division of said district. Terms of the district court for the northern division shall be held at Fresno on the first Monday in May and the second Monday in November; and for the southern division at Los Angeles, on the second Monday in January and the second Monday in July, and at San Diego on the second Mondays in March and September. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alameda, Alpine, Amador, Butte, Calaveras, Colusa, Contra Costa, Del Norte, El Dorado, Glenn, Humboldt, Lake, Lassen, Marin, Mendocino, Modoc, Mono, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Benito, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Trinity, Tuolumne, Yolo and Yuba. Terms of the district court for the northern district shall be held at San Francisco on the first Monday in March, the second Monday in July, and the first Monday in November; at Sacramento on the second Monday in April; and at Eureka on the third Monday in July. (5 Fed. Stats. Ann., 2d ed., p. 555; 2 U. S. Comp. Stats. 1916, § 1057.)

(Act of June 12, 1916.)

§ 73. (As amended.) That the State of Colorado shall constitute one judicial district, to be known as the district of Colorado. Terms of the

district court shall be held at Denver on the first Tuesday in May and November; at Pueblo on the first Tuesday in April; at Grand Junction on the second Tuesday in September; at Montrose on the third Tuesday in September, and at Durango on the fourth Tuesday in September.

That the Secretary of the Treasury, in constructing the public buildings heretofore authorized to be constructed at the cities of Grand Junction and Durango, be, and he is hereby, authorized and empowered to provide accommodations in each of said buildings for postoffice, United States court, and other governmental offices, and the existing authorizations for said buildings be and the same are hereby respectively amended accordingly; and the unexpended balance of all appropriations heretofore made for the construction of said buildings and all appropriations which may be provided in any pending legislation, or that hereafter may be made for the construction of said buildings, are hereby made available for the purpose stated in this paragraph: Provided, That if at the time the holding of the terms of said court in any year in either of said cities of Grand Junction and Durango there is no business to be transacted by said court, the term may be adjourned or continued by order of the judge of said court in chambers at Denver, Colorado: And provided further, That the marshal and clerk of said court shall each respectively appoint at least one deputy to reside at and who shall maintain an office at each of the four said places where said court is to be held by the terms of this Act.

§ 74. (Re-enacting § 531, Rev. Stats.) The state of Connecticut shall constitute one judicial district, to be known as the district of Connecticut. Terms of the district court shall be held at New Haven on the fourth Tuesdays in February and September, and at Hartford on the fourth Tuesday in May and the first Tuesday in December. (5 Fed. Stats. Ann., 2d ed., p. 557; 2 U. S. Comp. Stats. 1916, § 1059.)

§ 75. (Re-enacting § 531, Rev. Stats.) The state of Delaware shall constitute one judicial district, to be known as the district of Delaware. Terms of the district court shall be held at Wilmington on the second Tuesdays in March, June, September, and December." (5 Fed. Stats. Ann., 2d ed., p. 557; 2 U. S. Comp. Stats. 1916, § 1060.

§ 76. (Re-enacting § 534, Rev. Stats.) The state of Florida is divided into two districts, to be known as the northern and southern districts of Florida. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Baker, Bradford, Brevard, Citrus, Clay, Columbia, Dade, De Soto, Duva, Hamilton, Hernando, Hillsboro, Lake, Lee, Madison, Man-

atee, Marion, Monroe, Nassau, Orange, Osceola, Palm Beach, Pasco, Polk, Putnam, Saint John, Sumter, Suwanee, Saint Lucie, and Volusia. Terms of the district court for the southern district shall be held at Ocala on the third Monday in January; at Tampa on the second Monday in February; at Key West on the first Mondays in May and November; at Jacksonville on the first Monday in December; at Fernandina on the first Monday in April; and at Miami on the fourth Monday in April. The district court for the southern district shall be open at all times for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alachua, Calhoun, Escambia, Franklin, Gadsden, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Santa Rosa, Taylor, Wakulla, Walton, and Washington. Terms of the district court for the northern district shall be held at Tallahassee on the second Monday in January; at Pensacola on the first Mondays in May and November; at Marianna on the first Monday in April; and at Gainesville on the second Mondays in June and December. (5 Fed. Stats. Ann., 2d ed., p. 558; 2 U. S. Comp. Stats. 1916, § 1061.)

§ 77. (Re-enacting § 535, Rev. Stats., as amended March 4, 1913, c. 167.) The state of Georgia is divided into two districts, to be known as the northern and southern districts of Georgia. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Campbell, Carroll, Clayton, Cobb, Coweta, Cherokee, Dekalb, Douglas, Dawson, Fannin, Fayette, Fulton, Forsyth, Gilmer, Gwinnett, Hall, Henry, Lumpkin, Milton, Newton, Pickens, Rockdale, Spalding, Towns, and Union, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Banks, Clarke, Elbert, Franklin, Greene, Habersham, Hart, Jackson, Morgan, Madison, Oglethorpe, Oconee, Rabun, Stephens, Walton, and White, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Chattahoochee, Clay, Early, Harris, Heard, Meriwether, Marion, Muscogee, Quitman, Randolph, Schley, Stewart, Talbot, Taylor, Terrell, Troup, and Webster, which shall constitute the western division of said district; also the territory embraced on the date last mentioned in the counties of Bartow, Chattooga, Catoosa, Dade, Floyd, Gordon, Haralson, Murray, Paulding, Polk, Walker, and Whitfield, which shall constitute the northwestern division of said district. Terms of the district court for northern division of said district shall be held at Atlanta on the second

Monday in March and the first Monday in October and at Gainesville on the fourth Mondays in April and November, and it shall be the duty of the judge to assign such cases, both civil and criminal, as may in his judgment be most convenient to the parties to said cases, and as may be in the interest of economical expenditures by the government; for the eastern division at Athens on the second Monday in April and the first Monday in November; for the western division, at Columbus on the first Mondays in May and December; and for the northwestern division, at Rome on the third Mondays in May and November. The clerk of the court for the northern district shall maintain an office in charge of himself or a deputy at Athens, at Columbus, and at Rome, which shall be kept open at all times for the transaction of the business of the court. The southern district shall include the territory embraced on the said first day of July, nineteen hundred and ten, in the counties of Appling, Bulloch, Bryan, Camden, Chatham, Emanuel, Effingham, Glynn, Jeff Davis, Liberty, Montgomery, McIntosh, Screven, Tatnall, Toombs, and Wayne, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Baldwin, Bibb, Butts, Crawford, Dodge, Dooly, Hancock, Houston, Jasper, Jones, Laurens, Macon, Monroe, Pike, Pulaski, Putnam, Sumter, Telfair, Twiggs, Upson, Wilcox, and Wilkinson, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Burke, Columbia, Glascock, Jefferson, Jenkins, Johnson, Lincoln, McDuffie, Richmond, Taliaferro, Washington, Wilkes, and Warren, which shall constitute the northeastern division; also the territory embraced on the date last mentioned in the counties of Berrien, Brooks, Charlton, Clinch, Coffee, Decatur, Echols, Grady, Irwin, Lowndes, Pierce, and Ware, which shall constitute the southwestern division; and also the territory embraced on the date last mentioned in the counties of Baker, Ben Hill, Calhoun, Crisp, Colquitt, Dougherty, Lee, Miller, Mitchell, Thomas, Tift, Turner, and Worth, which shall constitute the Albany division. Terms of the district court for the western division shall be held at Macon on the first Mondays in May and October; for the eastern division, at Savannah on the second Tuesdays in February, May, August, and November; for the northeastern division, at Augusta on the first Monday in April and the third Monday in November; for the southwestern division, at Valdosta on the second Mondays in June and December; and for the Albany division, at Albany on the third Mondays in June and December. (5 Fed. Stats. Ann., 2d ed., p. 559; 2 U. S. Comp. Stats. 1916, § 1062.)

(Act of March 3, 1915, c. 96.)

§ 1. (Georgia southern district—Additional district judge.) That the President of the United States shall appoint an additional district judge for the southern district of the State of Georgia, by and with the consent of the Senate, who shall reside in the said district and shall possess the same qualifications and have the same power and jurisdiction and receive the same salary now prescribed by law in respect of the present district judge therein; Provided, however, That the President shall make public all indorsements made on behalf of the person appointed as such district judge. (38 Stats. 959; 5 Fed. Stats. Ann., 2d ed., p. 1092.)

§ 2. (Vacancy in office.) That whenever a vacancy shall occur in the office of the district judge for the southern district of the State of Georgia senior in commission such vacancy shall not be filled, and thereafter there shall be but one district judge in said district. (38 Stats. 960; 5 Fed. Stats. Ann., 2d ed., p. 1092.)

(Act of March 3, 1915, c. 98.)

(Georgia northern district—Boundaries enlarged.) That the county of Barrow, in the State of Georgia, is hereby attached to and made a part of the eastern division of the northern judicial district of said State. (38 Stats. 960; 5 Fed. Stats. Ann., 2d ed., p. 1092; 2 U. S. Comp. Stats. 1916, § 1062a.)

(Act of March 3, 1915, c. 99.)

§ 1. (Georgia southern district—Eastern division—Boundaries enlarged.) That the counties of Candler, Jenkins, and Evans, in the State of Georgia, are hereby attached to and made a part of the eastern division of the southern judicial district of said State. (38 Stats. 960; 5 Fed. Stats. Ann., 2d ed., p. 1092; 2 U. S. Comp. Stats. 1916, § 1062b.)

§ 2. (Southwestern division—Boundaries enlarged.) That the counties of Bacon and Thomas, in the State of Georgia, are hereby attached to and made a part of the southwestern division of the southern judicial district of said State. (38 Stats. 961; 5 Fed. Stats. Ann., 2d ed., p. 1093; 2 U. S. Comp. Stats., 1916, § 1062c.)

§ 78. (Re-enacting 26 Stats. 217; 27 Stats. 72; 28 Stats. 5; 30 Stats. 423.) The state of Idaho shall constitute one judicial district, to be known as the district of Idaho. It is divided into four divisions, to be known as the northern, central, southern, and eastern divisions. The territory embraced on the first day of July, nineteen hundred and ten, in

the counties of Bonner, Kootenai, and Shoshone, shall constitute the northern division of said district; and the territory embraced on the date last mentioned in the counties of Idaho, Latah, and Nez Perce, shall constitute the central division of said district; and the territory embraced on the date last mentioned in the counties of Ada, Boise, Blaine, Cassia, Twin Falls, Canyon, Elmore, Lincoln, Owyhee, and Washington, shall constitute the southern division of said district; and the territory embraced on the date last mentioned in the counties of Bannock, Bear Lake, Bingham, Custer, Fremont, Lemhi, and Oneida, shall constitute the eastern division of said district. Terms of the district court for the northern division of said district shall be held at Coeur d'Alene City on the fourth Monday in May and the third Monday in November; for the central division, at Moscow on the second Monday in May and the first Monday in November; for the southern division, at Boise City on the second Mondays in February and September; and for the eastern division, at Pocatello on the second Mondays in March and October. The clerk of the court shall maintain an office in charge of himself or a deputy at Coeur d'Alene City, at Moscow, at Boise City, and at Pocatello, which shall be open at all times for the transaction of the business of the court. (5 Fed. Stats. Ann., 2d ed., p. 560; 2 U. S. Comp. Stats. 1916, § 1063.)

§ 79. (Re-enacting § 536, Rev. Stats.) The state of Illinois is divided into three districts, to be known as the northern, southern, and eastern districts of Illinois. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Cook, Dekalb, Dupage, Grundy, Kane, Kendall, Lake, Lasalle, McHenry, and Will, which shall constitute the eastern division; also the territory embraced on the date last mentioned in the counties of Boone, Carroll, Jo Daviess, Lee, Ogle, Stephenson, Whiteside, and Winnebago, which shall constitute the western division. Terms of the district court for the eastern division shall be held at Chicago on the first Mondays in February, March, April, May, June, July, September, October, and November, and the third Monday in December; and for the western division, at Freeport on the third Mondays in April and October. The clerk of the court for the northern district shall maintain an office in charge of himself or a deputy at Chicago and at Freeport, which shall be kept open at all times for the transaction of the business of the court. The marshal for the northern district shall maintain an office in the division in which he himself does not reside, and shall appoint at least one deputy who shall reside therein. The southern district shall include the territory

embraced on the first day of July, nineteen hundred and ten, in the counties of Bureau, Fulton, Henderson, Henry, Knox, Livingston, McDonough, Marshall, Mercer, Putnam, Peoria, Rock Island, Stark, Tazewell, Warren, and Woodford, which shall constitute the northern division; also the territory embraced on the date last mentioned in the counties of Adams, Bond, Brown, Calhoun, Cass, Christian, Dewitt, Greene, Hancock, Jersey, Logan, McLean, Macon, Macoupin, Madison, Mason, Menard, Montgomery, Morgan, Pike, Sangamon, Schuyler, and Scott, which shall constitute the southern division. Terms of the district court for the northern division shall be held at Peoria on the third Mondays in April and October; for the southern division at Springfield on the first Mondays in January and June, and at Quincy on the first Mondays in March and September. The clerk of the court for the southern district shall maintain an office in charge of himself or a deputy at Peoria, at Springfield, and at Quincy, which shall be kept open at all times for the transaction of the business of the court. The marshal for said southern district shall appoint at least one deputy residing in the said northern district, who shall maintain an office at Peoria. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alexander, Champaign, Clark, Clay, Clinton, Coles, Crawford, Cumberland, Douglas, Edgar, Edwards, Effingham, Fayette, Ford, Franklin, Gallatin, Hamilton, Hardin, Iroquois, Jackson, Jasper, Jefferson, Johnson, Kankakee, Lawrence, Marion, Massac, Monroe, Moultrie, Perry, Piatt, Pope, Pulaski, Randolph, Richland, Saint Clair, Saline, Shelby, Union, Vermilion, Wabash, Washington, Wayne, White, and Williamson. Terms of the district court for the eastern district shall be held at Danville on the first Mondays in March and September; at Cairo on the first Mondays in April and October; and at East Saint Louis on the first Mondays in May and November. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Danville, at Cairo, and at East Saint Louis, which shall be kept open at all times for the transaction of the business of the court, and shall there keep the records, files, and documents pertaining to the court at that place. (5 Fed. Stats. Ann., 2d ed., p. 561; 2 U. S. Comp. Stats. 1916, § 1064.)

§ 80. (Re-enacting § 531, Rev. Stats.) The state of Indiana shall constitute one judicial district, to be known as the district of Indiana. Terms of the district court shall be held at Indianapolis on the first Tuesdays in May and November; at New Albany on the first Mondays in January and July; at Evansville on the first Mondays in April and

October; at Fort Wayne on the second Tuesdays in June and December; and at Hammond on the third Tuesdays in April and October. The clerk of the court shall appoint four deputy clerks, one of whom shall reside and keep his office at New Albany, one at Evansville, one at Fort Wayne, and one at Hammond. Each deputy shall keep in his office full records of all actions and proceedings of the district court held at that place. (5 Fed. Stats. Ann., 2d ed., p. 562; 2 U. S. Comp. Stats. 1916, § 1065.)

§ 81. (As amended Act of April 27, 1916.) The State of Iowa is divided into two judicial districts, to be known as the northern and southern districts of Iowa.

The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allamakee, Dubuque, Buchanan, Clayton, Delaware, Fayette, Winneshiek, Howard, Chickasaw, Bremer, Blackhawk, Floyd, Mitchell, and Jackson, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Jones, Cedar, Linn, Iowa, Benton, Tama, Grundy, and Hardin, which shall constitute the Cedar Rapids division; also the territory embraced on the date last mentioned in the counties of Emmet, Palo Alto, Pocahontas, Calhoun, Carroll, Kossuth, Humboldt, Webster, Winnebago, Hancock, Wright, Hamilton, Worth, Cerro Gordo, Franklin, and Butler, which shall constitute the central division; also the territory embraced on the date last mentioned in the counties of Dickinson, Clay, Buena Vista, Sac, Osceola, O'Brien, Cherokee, Ida, Lyon, Sioux, Plymouth, Woodbury, and Monona, which shall constitute the western division.

Terms of the district court for the eastern division shall be held at Dubuque on the fourth Tuesday in April and the first Tuesday in December, and at Waterloo on the second Tuesdays in May and September; for the Cedar Rapids division, at Cedar Rapids on the first Tuesday in April and the fourth Tuesday in September; for the central division, at Fort Dodge on the second Tuesdays in June and November; and for the western division, at Sioux City on the fourth Tuesday in May and the third Tuesday in October.

The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Louisa, Henry, Des Moines, Lee, and Van Buren, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Marshall, Story, Boone, Greene, Guthrie, Dallas, Polk, Jasper, Poweshiek, Marion, Warren, and Madison, which shall constitute the central division of said district; also

the territory embraced on the date last mentioned in the counties of Crawford, Harrison, Shelby, Audubon, Cass, Pottawattamie, Mills, and Montgomery, which shall constitute the western division of said district; also the territory embraced on the date last mentioned in the counties of Adair, Adams, Clarke, Decatur, Fremont, Lucas, Page, Ringgold, Taylor, Union, and Wayne, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Scott, Muscatine, Washington, Johnson, and Clinton, which shall constitute the Davenport division of said district; also the territory embraced on the date last mentioned in the counties of Davis, Appanoose, Mahaska, Keokuk, Jefferson, Monroe, and Wapello, which shall constitute the Ottumwa division of said district.

Terms of the district court for the eastern division shall be held at Keokuk on the sixth Tuesday after the fourth Tuesday in February and the eighth Tuesday after the third Tuesday in September; for the central division, at Des Moines on the tenth Tuesday after the fourth Tuesday in February and the tenth Tuesday after the third Tuesday in September; for the western division, at Council Bluffs on the fourth Tuesday in February and the sixth Tuesday after the third Tuesday in September; for the southern division, at Creston on the fourth Tuesday after the fourth Tuesday in February and the third Tuesday in September; for the Davenport division, at Davenport on the eighth Tuesday after the fourth Tuesday in February and the second Tuesday after the third Tuesday in September; and for the Ottumwa division, at Ottumwa on the second Tuesday after the fourth Tuesday in February and the fourth Tuesday after the third Tuesday in September.

The clerk of the court for said district shall maintain an office in charge of himself or a deputy at Davenport and at Ottumwa for the transaction of the business of said divisions. (Pamphlet Supp. Fed. Stats. Ann., No. 8, p. 13 et seq., title, "Judiciary.")

§ 82. (As amended Act of September 6, 1916.) That the State of Kansas shall constitute one judicial district, to be known as the district of Kansas. It is divided into three divisions, to be known as the first, second, and third divisions of the district of Kansas. The first division shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Atchison, Brown, Chase, Cheyenne, Clay, Cloud, Decatur, Dickinson, Doniphan, Douglas, Ellis, Franklin, Geary, Gove, Graham, Jackson, Jefferson, Jewell, Johnson, Leavenworth, Lincoln, Logan, Lyon, Marion, Marshall, Mitchell,

Morris, Nemaha, Norton, Osage, Osborne, Ottawa, Phillips, Pottawatomie, Rawlins, Republic, Riley, Rooks, Russell, Saline, Shawnee, Sheridan, Sherman, Smith, Thomas, Trego, Wabaunsee, Wallace, Washington, and Wyandotte. The second division shall include the territory embraced on the date last mentioned in the counties of Barber, Barton, Butler, Clark, Comanche, Cowley, Edwards, Ellsworth, Finney, Ford, Grant, Gray, Greeley, Hamilton, Harper, Harvey, Hodgeman, Haskell, Kingman, Kiowa, Kearny, Lane, McPherson, Morton, Meade, Ness, Pratt, Pawnee, Reno, Rice, Rush, Scott, Sedgwick, Stafford, Stevens, Seward, Sumner, Stanton, and Wichita. The third division shall include the territory embraced on the said date last mentioned in the counties of Allen, Anderson, Bourbon, Cherokee, Coffey, Chautauqua, Crawford, Elk, Greenwood, Labette, Linn, Miami, Montgomery, Neosho, Wilson, and Woodson. Terms of the district court for the first division shall be held at Leavenworth on the second Monday in October; at Topeka on the second Monday in April; at Kansas City on the second Monday in January and the first Monday in October; and at Salina on the second Monday in May; terms of the district court for the second division shall be held at Wichita on the second Mondays in March and September; and for the third division, at Fort Scott on the first Monday in May and the second Monday in November. The clerk of the district court shall appoint three deputies, one of whom shall reside and keep his office at Fort Scott, one at Wichita, and the other at Salina, and the marshal shall appoint a deputy who shall reside and keep his office at Fort Scott and the marshal shall also appoint a deputy, who shall reside and keep his office at Kansas City.

§ 83 (Re-enacting § 531, Rev. Stats.). The state of Kentucky is divided into two districts, to be known as the eastern and western districts of Kentucky. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Carroll, Trimble, Henry, Shelby, Anderson, Mercer, Boyle, Gallatin, Boone, Kenton, Campbell, Pendleton, Grant, Owen, Franklin, Bourbon, Scott, Woodford, Fayette, Jessamine, Garrard, Madison, Lincoln, Rockcastle, Pulaski, Wayne, Whitley, Bell, Knox, Harlan, Laurel, Clay, Leslie, Letcher, Perry, Owsley, Jackson, Estill, Lee, Breathitt, Knott, Pike, Floyd, Magoffin, Martin, Johnson, Lawrence, Boyd, Greenup, Carter, Elliott, Morgan, Wolfe, Powell, Menifee, Clark, Montgomery, Bath, Rowan, Lewis, Fleming, Mason, Bracken, Robertson, Nicholas, and Harrison, with the waters thereof. Terms of the district court for the eastern district shall be held at Frankfort on the second Monday in March and the fourth Monday in September; at Covington on the first Monday in April and the

third Monday in October; at Richmond on the fourth Monday in April and the second Monday in November; at London on the second Monday in May and the fourth Monday in November; at Catlettsburg on the fourth Monday in May and the second Monday in December; and at Jackson on the first Monday in March and the third Monday in September: *Provided,* That suitable rooms and accommodations are furnished for holding court at Jackson, free of expense to the government until such time as a public building shall be erected there. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Oldham, Jefferson, Spencer, Bullitt, Nelson, Washington, Marion, Larue, Taylor, Cassey, Green, Adair, Russell, Clinton, Cumberland, Monroe, Metcalfe, Allen, Barren, Simpson, Logan, Warren, Butler, Hart, Edmonson, Grayson, Hardin, Meade, Breckinridge, Hancock, Daviess, Ohio, McLean, Muhlenberg, Todd, Christian, Trigg, Lyon, Caldwell, Livingston, Crittenden, Hopkins, Webster, Henderson, Union, Marshall, Calloway, McCracken, Graves, Ballard, Carlisle, Hickman, and Fulton, with the waters thereof. Terms of the district court for the western district shall be held at Louisville on the second Mondays in March and October; at Owensboro on the first Monday in May and the fourth Monday in November; at Paducah on the third Mondays in April and November; and at Bowling Green on the third Monday in May and the second Monday in December. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Frankfort, at Covington, at Richmond, at London, at Catlettsburg, and at Jackson; and the clerk for the western district shall maintain an office in charge of himself or a deputy at Louisville, at Owensboro, at Paducah, and at Bowling Green, each of which offices shall be kept open at all times for the transaction of the business of said court. The clerks of the courts for the eastern and western districts, upon issuing original process in a civil action, shall make it returnable to the court nearest to the county of the residence of the defendant, or of that defendant whose county is nearest to a court, and shall, immediately upon payment by the plaintiff of his fees accrued, send the papers filed to the clerk of the court to which the process is made returnable; and whenever the process is not thus made returnable, any defendant may, upon motion, on or before the calling of the cause, have it transferred to the court to which it should have been sent had the clerk known the residence of the defendant when the action was brought. (5 Fed. Stats. Ann., 2d ed., p. 566; 2 U. S. Comp. Stats. 1916, § 1068.)

§ 84 (Re-enacting Act of March 3, 1881, c. 144 with amendments thereto). The state of Louisiana is divided into two judicial districts, to be known as the eastern and western districts of Louisiana. The eastern district shall in-

clude the territory embraced on the first day of July, nineteen hundred and ten, in the parishes of Assumption, Iberia, Jefferson, Lafourche, Orleans, Plaquemines, Saint Bernard, Saint Charles, Saint James, Saint John the Baptist, Saint Mary, Saint Tammany, Tangipahoa, Terrebonne, and Washington, which shall constitute the New Orleans division; also the territory embraced on the date last mentioned in the parishes of Ascension, East Baton Rouge, East Feliciana, Livingston, Pointe Coupee, Saint Helena, West Baton Rouge, Iberville, and West Feliciana, which shall constitute the Baton Rouge division of said district. Terms of the district court for the New Orleans division shall be held at New Orleans on the third Mondays in February, May, and November; and for the Baton Rouge division, at Baton Rouge on the second Mondays in April and November. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at New Orleans and at Baton Rouge which shall be kept open at all times for the transaction of the business of the court. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the parishes of Saint Landry, Evangeline, Saint Martin, Lafayette, and Vermilion, which shall constitute the Opelousas division of said district; also the territory embraced on the date last mentioned in the parishes of Rapides, Avoyelles, Catahoula, La Salle, Grant, and Winn, which shall constitute the Alexandria division of said district; also the territory embraced on the said date last mentioned in the parishes of Caddo, De Soto, Bossier, Webster, Claiborne, Bienville, Natchitoches, Sabine, and Red River, which shall constitute the Shreveport division of said district; also the territory embraced on the date last mentioned in the parishes of Ouachita, Franklin, Richland, Morehouse, East Carroll, West Carroll, Madison, Tensas, Concordia, Union, Caldwell, Jackson, and Lincoln, which shall constitute the Monroe division of said district; also the territory embraced on the date last mentioned in the parishes of Acadia, Calcasieu, Cameron, and Vernon, which shall constitute the Lake Charles division of said district. Terms of the district court for the Opelousas division shall be held at Opelousas on the first Mondays in January and June; for the Alexandria division, at Alexandria on the fourth Mondays in January and June; for the Shreveport division, at Shreveport on the third Mondays in February and October; for the Monroe division, at Monroe on the first Mondays in April and October; and for the Lake Charles division, at Lake Charles on the third Mondays in May and December. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Opelousas, at Alexandria, at Shreveport, at Monroe, and at Lake Charles, which shall be kept open at all times for the transaction of

the business of the court. (5 Fed. Stats. Ann., 2d ed., p. 568; 2 U. S. Comp. Stats. 1916, § 1069.)

§ 85 (Re-enacting § 531, Rev. Stats.). The state of Maine shall constitute one judicial district, to be known as the district of Maine. Terms of the district court shall be held at the times and places following: At Portland, on the first Tuesday in April, on the third Tuesday in September, and on the second Tuesday in December; at Bangor, on the first Tuesday in June: *Provided, however,* That in the year nineteen hundred and twelve a session shall be also held at Portland on the first Tuesday in February. (5 Fed. Stats. Ann., 2d ed., p. 569; 2 U. S. Comp. Stats. 1916, § 1070.)

Act Sept. 8, 1916, c. 475.

§ 1. [*Maine judicial district—Sessions of court—Division of district.*] That hereafter, and until otherwise provided by law, two sessions of the United States District Court for the District of Maine shall be held in each and every year in the city of Bangor, in said district, beginning, respectively, on the first Tuesday of February and the first Tuesday of June, and three sessions of said court shall be held in each and every year in the city of Portland, in said district, beginning, respectively, on the first Tuesday of April, on the third Tuesday of September, and on the second Tuesday in December. (2 U. S. Comp. Stats. 1916, § 1070a.)

§ 2. [Clerks and marshals.] The clerk of said district court for said district of Maine and the marshal of said district shall each at all times maintain by himself or by deputy an office in charge of himself or deputy, both at said city of Bangor and at said city of Portland. The deputy clerk in charge of the office in the division in which the clerk does not reside himself shall reside in the city where the office of which he has charge is located. That said marshal shall appoint a field deputy, who shall have charge of the office in the division in which the marshal does not reside himself, who shall reside in the city where the office of which he has charge is located, and who, within and for said division, in the absence of the marshal, shall have all the powers of the marshal, and who shall also, throughout said district of Maine, have all the powers of other deputy marshals. And such field deputy, before he enters on the duties of his office, shall give bond before the judge of said district of like tenor, effect, and amount and of similar form and condition, with like sureties, and to be approved in like manner, as now or may hereafter be required by law of the marshal of said district. (2 U. S. Comp. Stats. 1916, § 1070b.)

§ 3. [Divisions—Number—Boundaries.] That for the purpose of holding terms of the United States district court the district of Maine as heretofore constituted shall be divided into two divisions, to be known, respectively, as the northern and southern divisions. The counties of Aroostook, Penobscot, Piscataquis, Washington, Hancock, Waldo, and Somerset shall be known as the northern division, the court for which shall be held in the said city of Bangor. The remaining counties in said State and district of Maine shall constitute the southern division, the court for which shall be held in the said city of Portland. (2 U. S. Comp. Stats. 1916, § 1070c.)

§ 4. [Jurisdiction and venue—Divisions as separate districts.] That for the purpose of determining the jurisdiction and venue of all causes, suits, actions, bills, petitions, matters, libels, proceedings, prosecutions, indictments, complaints, informations, and other judicial business, whether civil or criminal, or whether in equity, in admiralty, in prize, in forfeiture, or in condemnation, *in rem, in personam,* or mixed, whatsoever, cognizable in the United States district court, each of said divisions shall be as if it were a separate and distinct judicial district of the United States. There shall be but one judge, one clerk, one marshal, and one district attorney for said district of Maine. United States commissioners in either of said divisions, until otherwise provided by law, shall be appointed and have jurisdiction and cognizance through said district of Maine in the same manner and to the same extent and effect that they now have under existing law. (2 U. S. Comp. Stats. 1916, § 1070d.)

§ 5. [Transfer of causes from one division to another.] That any cause, suit, action, bill, petition, matter, libel, proceeding, prosecution, indictment, complaint, information, or other judicial business, whether civil or criminal, or whether in equity, in admiralty, in prize, in forfeiture, or in condemnation, *in rem, in personam,* or mixed, whatsoever, pending in either of said divisions, when all the parties thereto so stipulate in writing, and where the ends of justice or the convenience of the parties will be promoted thereby, may, at the discretion of the court or judge, be transferred wholly or specially for the hearing, trial, or determination of any single proceeding, matter, step, or motion therein from one of said divisions to the other. On request of all accused in any criminal prosecution and of all claimants in any cause, proceeding, libel, information, or other matter *in rem,* the same may be transferred, at the discretion of the court or judge from one of said divisions to the division in which a term of said court is next to be held, without the joinder in such request

of the United States when the Government is the only other party thereto not joining in such request. (2 U. S. Comp. Stats. 1916, § 1070e.)

§ 6. [*Ex parte, etc.,* proceedings—Hearings by consent.] That all *ex parte,* of course, default and *pro confesso,* proceedings and matters, and all interlocutory matters in which all interested parties are present and consenting that such hearing may be had, in whichever of said divisions the same may be cognizable or pending, may be heard and determined by the court or judge and all findings, orders, judgments, and decrees be made, and all mesne and final process therein be tested, sealed, issued, and renewed in either of said divisions, in term time, vacation, or chambers. (2 U. S. Comp. Stats. 1916, § 1070f.)

§ 7. [Change of venue—Continuance.] That nothing in this Act contained shall be construed to deprive the court or judge of the power to grant a change of venue or continuance in any cause, proceeding, or matter whatsoever according to law and the requirements of justice. (2 U. S. Comp. Stats. 1916, § 1070g.)

§ 8. [Time of taking effect of Act—Inconsistent Acts.] That this Act shall take effect on the day following its passage, but it shall not apply to or in any wise affect any cause, suit, action, bill, petition, matter, libel, proceeding, prosecution, indictment, complaint, information, stipulation, bail bond, or recognizance now pending in said court, or which has already been instituted, begun, filed, entered, made, served, found, or taken, but the same shall depend, be entered, returned, continued, prosecuted, tried, heard, and determined and suitable and appropriate orders, judgment, decrees, and executions, mesne and final and all other process, attachment, monitions, stipulations, bonds, recognizances therein, shall be made, signed, tested, sealed, issued, renewed, served, executed, entered, and returned, the same as under existing law and as if this Act had never been passed, except for the purposes mentioned in sections five and six of this Act. All Acts and parts of Acts inconsistent with this Act are hereby repealed. (2 U. S. Comp. Stats. 1916, § 1070h.)

§ 86 (Re-enacting § 531, Rev. Stats.). The state of Maryland shall constitute one judicial district, to be known as the district of Maryland. Terms of the district court shall be held at Baltimore on the first Tuesdays in March, June, September, and December; and at Cumberland on the second Monday in May and the last Monday in September. The clerk of the court shall appoint a deputy who shall reside and maintain an office at Cumberland, unless the clerk shall himself reside there; and the marshal shall also appoint a deputy who shall reside and maintain an

office at Cumberland, unless he shall himself reside there. (5 Fed. Stats. Ann., 2d ed., p. 569; 2 U. S. Comp. Stats. 1916, § 1071.)

§ 87 (Re-enacting § 531, Rev. Stats.). The state of Massachusetts shall constitute one judicial district, to be known as the district of Massachusetts. Terms of the district court shall be held at Boston on the third Tuesday in March, the fourth Tuesday in June, the second Tuesday in September, and the first Tuesday in December; and at Springfield, on the second Tuesdays in May and December: *Provided*, That suitable rooms and accommodations for holding court at Springfield shall be furnished free of expense to the government until such time as a Federal building shall be erected there for that purpose. The marshal and the clerk for said district shall each appoint at least one deputy, to reside in Springfield and to maintain an office at that place. (5 Fed. Stats. Ann., 2d ed., p. 570; 2 U. S. Comp. Stats. 1916, § 1072.)

§ 88 (Re-enacting § 538, Rev. Stats.), as Amended Act July 9, 1912, c. 222. The state of Michigan is divided into two judicial districts, to be known as the eastern and western districts of Michigan. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Genesee, Gladwin, Gratiot, Huron, Iosco, Isabella, Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, Shiawassee, and Tuscola, which shall constitute the northern division; also the territory embraced on the date last mentioned in the counties of Branch, Calhoun, Clinton, Hillsdale, Ingham, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, St. Clair, Sanilac, Washtenaw, and Wayne, which shall constitute the southern division of said district. Terms of the district court for the southern division shall be held at Detroit on the first Tuesdays in March, June and November; for the northern division, at Bay City on the first Tuesdays in May and October, and at Port Huron in the discretion of the judge of said court and at such times as he shall appoint therefor. There shall also be held a special or adjourned term of the district court at Bay City for the hearing of admiralty causes, beginning in the month of February in each year. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alger, Baraga, Chippewa, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Luce, Mackinac, Marquette, Menominee, Ontonagon, and Schoolcraft, which shall constitute the northern division; also the territory embraced on the said date last mentioned in the counties of Allegan, Antrim, Barry, Benzie, Berrien, Cass, Charlevoix, Eaton,

Emmet, Grand Traverse, Ionia, Kalamazoo, Kalkaska, Kent, Lake, Leelanau, Manistee, Mason, Mecosta, Missaukee, Montcalm, Muskegon, Newaygo, Oceana, Osceola, Ottawa, St. Joseph, Van Buren, and Wexford, which shall constitute the southern division of said district. Terms of the district court for the western district of Michigan for the southern division shall be held at Grand Rapids, commencing on the first Tuesdays in March, June, October, and December; and for the northern division at Marquette, commencing on the first Tuesdays in April and September; and at Sault Sainte Marie, commencing on the second Tuesdays in January and July. (Terms for Western district of Southern Division, 37 Stats. 190, 5 Fed. Stats. Ann., 2d ed., p. 1093.) All issues of fact shall be tried at the terms in the division where such suit shall be commenced. Actions *in rem* and admiralty may be brought in whichever division of the eastern district service can be had upon the *res*. Nothing herein contained shall prevent the district court of the western division from regulating, by general rule, the venue of transitory actions either at law or in equity, or from changing the same for cause. The clerk of the court for the western district shall reside and keep his office at Grand Rapids, and shall also appoint a deputy clerk for said court held at Marquette, who shall reside and keep his office at that place. The marshal for said western district shall keep an office and a deputy marshal at Marquette. The clerk of the court for the eastern district shall keep his office at the city of Detroit, and shall appoint a deputy for the court held at Bay City, who shall reside and keep his office at that place. The marshal for said district shall keep an office and a deputy marshal at Bay City, and mileage on service of process in said northern division shall be computed from Bay City. (5 Fed. Stats. Ann., 2d ed., p. 570; 2 U. S. Comp. Stats. 1916, § 1073.)

§ 89 (Re-enacting § 531, Rev. Stats.). The state of Minnesota shall constitute one judicial district, to be known as the district of Minnesota. It is divided into six divisions, to be known as the first, second, third, fourth, fifth, and sixth divisions. The first division shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Winona, Wabasha, Olmsted, Dodge, Steele, Mower, Fillmore, and Houston. The second division shall include the territory embraced on the date last mentioned in the counties of Freeborn, Faribault, Martin, Jackson, Nobles, Rock, Pipestone, Murray, Cottonwood, Watonwan, Blue Earth, Waseca, Lesueur, Nicollet, Brown, Redwood, Lyon, Lincoln, Yellow Medicine, Sibley, and Lac qui Parle. The third division shall include the territory embraced on the date last mentioned in the counties of Chisago, Washington, Ramsey, Dakota, Goodhue, Rice, and Scott. The fourth division shall include the territory embraced on

the date last mentioned in the counties of Hennepin, Wright, Meeker, Kandiyohi, Swift, Chippewa, Renville, McLeod, Carver, Anoka, Sherburne, and Isanti. The fifth division shall include the territory embraced on the date last mentioned in the counties of Cook, Lake, Saint Louis, Itasca, Koochiching, Cass, Crow Wing, Aitkin, Carlton, Pine, Kanabec, Mille Lacs, Morrison, and Benton. The sixth division shall include the territory embraced on the date last mentioned in the counties of Stearns, Pope, Stevens, Bigstone, Traverse, Grant, Douglas, Todd, Ottertail, Roseau, Wilkin, Clay, Becker, Wadena, Norman, Polk, Red Lake, Marshall, Kittson, Beltrami, Clearwater, Mahnomen, and Hubbard. Terms of the district court for the first division shall be held at Winona on the third Tuesdays in May and November; for the second division, at Mankato on the fourth Tuesdays in April and October; for the third division, at Saint Paul on the first Tuesdays in June and December; for the fourth division, at Minneapolis on the first Tuesdays in April and October; for the fifth division, at Duluth on the second Tuesdays in January and July; and for the sixth division, at Fergus Falls on the first Tuesday in May and second Tuesday in November. The clerk of the court shall appoint a deputy clerk at each place where the court is now required to be held at which the clerk shall not himself reside, who shall keep his office and reside at the place appointed for the holding of said court. (5 Fed. Stats. Ann., 2d ed., p. 571; 2 U. S. Comp. Stats. 1916, § 1075.)

§ 90 (Re-enacting Act June 15, 1882, c. 218), as Amended Act May 27, 1912, c. 136. The state of Mississippi is divided into two judicial districts, to be known as the northern and southern districts of Mississippi. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alcorn, Attala, Chickasaw, Choctaw, Clay, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Pontotoc, Prentiss, Tishomingo, and Winston, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Benton, Calhoun, Carroll, De Soto, Grenada, Lafayette, Marshall, Montgomery, Panola, Tate, Tippah, Union, Webster, and Yalobusha, which shall constitute the western division of said district. Also the territory embraced on the date last mentioned in the counties of Bolivar, Coahoma, Leflore, Quitman, Sunflower, Tallahatchie, and Tunica, which shall constitute the Delta division of said district. The terms of the district court for the eastern division shall be held at Aberdeen on the first Mondays in April and October; and for the western division, at Oxford on the first Mondays in June and December, and for the Delta division at Clarksdale on the fourth Mondays in January and July; *Provided,* That suitable rooms and accom-

modations for holding court at Clarksdale are furnished free of expense to the United States. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Amite, Copiah, Covington, Franklin, Hinds, Holmes, Jefferson, Jefferson Davis, Lawrence, Lincoln, Madison, Pike, Rankin, Simpson, Smith, Scott, Wilkinson, and Yazoo, which shall constitute the Jackson division; also the territory embraced on the date last mentioned in the counties of Claiborne, Issaquena, Sharkey, Warren, and Washington, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Clarke, Jones, Jasper, Kemper, Lauderdale, Leake, Neshoba, Newton, Noxubee, and Wayne, which shall constitute the eastern division; also the territory embraced on the date last mentioned in the counties of Forrest, Greene, Hancock, Harrison, Jackson, Lamar, Marion, Perry, and Pearl River, which shall constitute the southern division of said district. Terms of the district court for the Jackson division shall be held at Jackson on the first Mondays in May and November; for the western division, at Vicksburg on the first Mondays in January and July; for the eastern division, at Meridian on the second Mondays in March and September; and for the southern division, at Biloxi on the third Mondays in February and August. The clerk of the court for each district shall maintain an office in charge of himself or a deputy at each place in his district at which court is now required to be held, at which he shall not himself reside, which shall be kept open at all times for the transaction of the business of the court. The marshal for each of said districts shall maintain an office in charge of himself or a deputy at each place of holding court in his district. (5 Fed. Stats. Ann., 2d ed., p. 572; 2 U. S. Comp. Stats. 1916, § 1076.)

§ 91 (Re-enacting Act of Feb. 28, 1887, c. 271, as Amended Act Dec. 22, 1911, c. 8). The state of Missouri is divided into two judicial districts, to be known as the eastern and western districts of Missouri. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the city of Saint Louis and the counties of Audrain, Crawford, Dent, Franklin, Gasconade, Iron, Jefferson, Lincoln, Maries, Montgomery, Phelps, Saint Charles, Saint Francois, Sainte Genevieve, Saint Louis, Warren, and Washington, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Adair, Chariton, Clark, Knox, Lewis, Linn, Macon, Marion, Monroe, Pike, Ralls, Randolph, Schuyler, Scotland, and Shelby, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Bollinger, But-

ler; Cape Girardeau, Carter, Dunklin, Madison, Mississippi, New Madrid, Pemiscot, Perry, Reynolds, Ripley, Scott, Shannon, Stoddard, and Wayne, which shall constitute the southeastern division of said district. Terms of the district court for the eastern division shall be held at Saint Louis on the third Mondays in March and September, and at Rolla on the second Mondays in January and June: *Provided,* That suitable rooms and accommodations for holding court at Rolla are furnished free of expense to the United States; for the northern division, at Hannibal on the fourth Monday in May and the first Monday in December; and for the southeastern division, at Cape Girardeau on the second Mondays in April and October. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bates, Caldwell, Carroll, Cass, Clay, Grundy, Henry, Jackson, Johnson, Lafayette, Livingston, Mercer, Putnam, Ray, Saint Clair, Saline, and Sullivan, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Barton, Barry, Jasper, Lawrence, McDonald, Newton, Stone, and Vernon, which shall constitute the southwestern division; also the territory embraced on the date last mentioned in the counties at Andrew, Atchison, Buchanan, Clinton, Daviess, Dekalb, Gentry, Holt, Harrison, Nodaway, Platte, and Worth, which shall constitute the Saint Joseph division; also the territory embraced on the date last mentioned in the counties of Benton, Boone, Callaway, Cooper, Camden, Cole, Hickory, Howard, Miller, Moniteau, Morgan, Osage, and Pettis, which shall constitute the central division; also the territory embraced on the date last mentioned in the counties of Christian, Cedar, Dade, Dallas, Douglas, Greene, Howell, Laclede, Oregon, Ozard, Polk, Pulaski, Taney, Texas, Webster, and Wright, which shall constitute the southern division. Terms of the district court for the western division shall be held at Kansas City on the fourth Monday in April and the first Monday in November, and at Chillicothe on the fourth Monday in May and the first Monday in December: *Provided,* That suitable rooms and accommodations for holding court at Chillicothe are furnished free of expense to the United States; for the southwestern division, at Joplin on the second Mondays in June and January; for the Saint Joseph division, at Saint Joseph on the first Monday in March and third Monday in September; for the central division, at Jefferson City on the third Mondays in March and October; and for the southern division, at Springfield on the first Mondays in April and October. The clerk of the court at Saint Louis in the eastern district shall maintain an office in charge of himself or a deputy at Saint Louis and Hannibal, and at such other places of holding court in said district as may be deemed necessary to the judge,

which shall be kept open at all times for the transaction of the business of the court. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Kansas City, at Jefferson City, at Saint Joseph, at Chillicothe, at Joplin, and at Springfield, which shall be kept open at all times for the transaction of the business of the court. The marshal for each district shall also maintain an office in charge of himself or a deputy at each place at which court is now held in his district. (5 Fed. Stats. Ann., 2d ed., p. 574; 2 U. S. Comp. Stats. 1916, § 1077.)

§ 92 (Re-enacting 25 Stats. 628). The state of Montana shall constitute one judicial district to be known as the district of Montana. Terms of the district court shall be held at Helena on the first Mondays in April and November; at Butte on the first Tuesdays in February and September; at Great Falls on the first Mondays in May and October; at Missoula on the first Mondays in January and June; and at Billings on the first Mondays in March and August. Causes, civil and criminal, may be transferred by the court or judge thereof from Helena to Butte or from Butte to Helena, or from Helena or Butte to Great Falls, or from Great Falls to Helena or Butte, in said district, when the convenience of the parties or the ends of justice would be promoted by the transfer; and any interlocutory order may be made by the court or judge thereof in either place. (5 Fed. Stats. Ann., 2d ed., 575; 2 U. S. Comp. Stats. 1916, § 1078.)

§ 93 (Re-enacting § 531, Rev. Stats.). The state of Nebraska shall constitute one judicial district, to be known as the district of Nebraska. Said district is divided into eight divisions. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Douglas, Sarpy, Washington, Dodge, Colfax, Platte, Nance, Boone, Wheeler, Burt, Thurston, Dakota, Cuming, Cedar, and Dixon, shall constitute the Omaha division; the territory embraced on the date last mentioned in the counties of Madison, Antelope, Knox, Pierce, Stanton, Wayne, Holt, Boyd, Rock, Brown, and Keya Paha, shall constitute the Norfolk division; the territory embraced on the date last mentioned in the counties of Cherry, Sheridan, Dawes, Box Butte, and Sioux, shall constitute the Chadron division; the territory embraced on the date last mentioned in the counties of Hall, Merrick, Howard, Greeley, Garfield, Valley, Sherman, Buffalo, Custer, Loup, Blaine, Thomas, Hooker, and Grant, shall constitute the Grand Island division; the territory embraced on the date last mentioned in the counties of Lincoln, Dawson, Logan, McPherson, Keith, Deuel, Garden, Morrill, Cheyenne, Kimball, Banner, and Scott's

Bluff, shall constitute the North Platte division; the territory embraced on the date last mentioned in the counties of Cass, Otoe, Johnson, Nemaha, Pawnee, Richardson, Gage, Lancaster, Saunders, Butler, Seward, Saline, Jefferson, Thayer, Fillmore, York, Polk, and Hamilton, shall constitute the Lincoln division; the territory embraced on the date last mentioned in the counties of Clay, Nuckolls, Webster, Adams, Kearney, Franklin, Harlan, and Phelps, shall constitute the Hastings division; and the territory embraced on the date last mentioned in the counties of Gosper, Furnas, Red Willow, Frontier, Hayes, Hitchcock, Dundy, Chase, and Perkins, shall constitute the McCook division. Terms of the district court for the Omaha division shall be held at Omaha on the first Monday in April and the fourth Monday in September; for the Norfolk division, at Norfolk on the third Monday in September; for the Chadron division, at Chadron on the second Monday in September; for the Grand Island division, at Grand Island on the second Monday in January, for the North Platte division, at North Platte on the second Monday in June; for the Lincoln division, at Lincoln on the second Monday in May and the first Monday in October; for the Hastings division, at Hastings on the second Monday in March; and for the McCook division, at McCook on the first Monday in March: *Provided,* That where provision is made herein for holding court at places where there are no Federal buildings, a suitable room in which to hold court, together with light and heat, shall be provided by the city or county where such court is held, without any expense to the United States. The clerk of the court shall appoint a deputy for each division of the district in which he does not himself reside, who shall keep his office and reside at the place of holding court in the division for which he is appointed. (5 Fed. Stats. Ann., 2d ed., p. 576; 2 U. S. Comp. Stats. 1916, § 1079.)

§ 94 (Re-enacting § 531, Rev. Stats.). The state of Nevada shall constitute one judicial district, to be known as the district of Nevada. Terms of the district court shall be held at Carson City on the first Mondays in February, May, and October. (5 Fed. Stats. Ann., 2d ed., p. 577; 2 U. S. Comp. Stats. 1916, § 1080.)

§ 95 (Re-enacting § 531, Rev. Stats.), as Amended Act August 23, 1912, c. 344. "The state of New Hampshire shall constitute one judicial district, to be known as the district of New Hampshire. Terms of the district court shall be held at Portsmouth on the last Tuesday in October; at Concord on the last Tuesday in April and second Tuesday in December; and at Littleton on the third Tuesday in September. (5 Fed. Stats. Ann., 2d ed., p. 577; 2 U. S. Comp. Stats. 1916, § 1081.)

§ 96 (Re-enacting § 531, Rev. Stats.), as Amended Act Feb. 14, 1913, c. 53. The state of New Jersey shall constitute one judicial district, to be known as the district of New Jersey. Terms of the district court shall be held at Newark on the first Tuesday in April and the first Tuesday in November; and at Trenton on the third Tuesday in January and the second Tuesday in September of each year. The clerk of the court for the district of New Jersey shall maintain an office, in charge of himself or a deputy, at Newark and at Trenton, each of which offices shall be kept open at all times for the transaction of the business of the court; and the marshal shall also maintain an office, in charge of himself or a deputy, at Newark and at Trenton, each of which offices shall be kept open at all times for the transaction of the business of the court. (5 Fed. Stats. Ann., 2d ed., p. 577; 2 U. S. Comp. Stats. 1916, § 1082.)

§ 1, Act of April 11, 1916. (New Jersey judicial district—Additional judge—Residence, etc.) That the President of the United States be, and he hereby is, authorized and directed, by and with the advice and consent of the Senate, to appoint an additional judge of the district court of the United States for the district of New Jersey, who shall reside in said district, and whose term of office, compensation, duties, and powers shall be the same as now provided by law for the judge of said district. (Pamphlet Supp. Fed. Stats. Ann., title "Judiciary," No. 7, p. 13.)

§ 2. That this Act shall take effect immediately.

§ 13, Act June 20, 1910, c. 310. That the state, when admitted as aforesaid, shall constitute one judicial district, and the circuit and district courts of said district shall be held at the capital of said state, and the said district shall, for judicial purposes, be attached to the eighth judicial circuit. There shall be appointed for said district one district judge, one United States attorney, and one United States marshal. The judge of said district shall receive a yearly salary the same as other similar judges of the United States, payable as provided for by law, and shall reside in the district to which he is appointed. There shall be appointed clerks of said courts, who shall keep their offices at the capital of said state. The regular terms of said courts shall be held on the first Monday in April and the first Monday in October of each year. The circuit and district courts for said district, and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. The marshal, district attorney, and the clerks of the

circuit and district courts of said district, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States, and shall, for the services they may perform, receive the fees and compensation now allowed by law to officers performing similar services for the United States in the Territory of New Mexico. (36 Stats. 565; 5 Fed. Stats. Ann., 2d ed., p. 1094; 2 U. S. Comp. Stats. 1916, § 1083.)

§ 97 (Drawn from §§ 597, 599, Rev. Stats.). The state of New York is divided into four judicial districts, to be known as the northern, eastern, southern, and western districts of New York. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Albany, Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, Rensselaer, Saint Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Warren, and Washington, with the waters thereof. Terms of the district court for said district shall be held at Albany on the second Tuesday in February; at Utica on the first Tuesday in December; at Binghamton on the second Tuesday in June; at Auburn on the first Tuesday in October; at Syracuse on the first Tuesday in April; and, in the discretion of the judge of the court, one term annually at such time and place within the counties of Saratoga, Onondaga, Saint Lawrence, Clinton, Jefferson, Oswego, and Franklin, as he may from time to time appoint. Such appointment shall be made by notice of at least twenty days published in a newspaper published at the place where said court is to be held. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Richmond, Kings, Queens, Nassau, and Suffolk, with the waters thereof. Terms of the district court for said district shall be held at Brooklyn on the first Wednesday in every month. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Columbia, Dutchess, Greene, New York, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester, with the waters thereof. Terms of the district court for said district shall be held at New York city on the first Tuesday in each month. The district courts of the southern and eastern districts shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, Nassau, Richmond, and Suffolk, and over all seizures made and all matters done in such waters; all processes or orders issued within either of said courts or by any judge thereof shall run and be executed in any part of said waters. The western

district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allegany, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming, and Yates, with the waters thereof. Terms of the district court for said district shall be held at Elmira on the second Tuesday in January; at Buffalo on the second Tuesdays in March and November; at Rochester on the second Tuesday in May; at Jamestown on the second Tuesday in July; at Lockport on the second Tuesday in October; and at Canandaigua on the second Tuesday in September. The regular sessions of the district court for the western district for the hearing of motions and for proceedings in bankruptcy and the trial of causes in admiralty, shall be held at Buffalo at least two weeks in each month of the year, except August, unless the business is sooner disposed of. The times for holding the same and such other special sessions as the court shall deem necessary shall be fixed by the rules of the court. All process in admiralty causes and proceedings shall be made returnable at Buffalo. The judge of any district in the state of New York may perform the duties of the judge of any other district in such state upon the request of any resident judge entered in the minutes of his court; and in such cases such judge shall have the same powers as are vested in the resident judge. (5 Fed. Stats. Ann., 2d ed., p. 578; 2 U. S. Comp. Stats. 1916, § 1084.)

§ 98, as Amended Act Oct. 7, 1914, c. 318. The State of North Carolina is divided into two districts, to be known as the eastern and western districts of North Carolina. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Beaufort, Bertie, Bladen, Brunswick, Camden, Chatham, Cumberland, Currituck, Craven, Columbus, Chowan, Carteret, Dare, Daplin, Durham, Edgecomb, Franklin, Gates, Granville, Greene, Halifax, Harnett, Hertford, Hyde, Johnston, Jones, Lenoir, Lee, Martin, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Robeson, Richmond, Sampson, Scotland, Tyrrell, Vance, Wake, Warren, Washington, Wayne, and Wilson. Terms of the district court for the eastern district shall be held at Laurinburg on the last Mondays in March and September; at Wilson on the first Mondays in April and October; at Elizabeth City on the second Mondays in April and October; at Washington on the third Mondays in April and October; at Newbern on the fourth Mondays in April and October; at Wilmington on the second Monday after the fourth Mondays in April and October; and at Raleigh on the fourth Monday after the fourth Mondays in April

and October: *Provided,* that the city of Washington, the city of Laurinburg, and the city of Wilson shall each provide and furnish at its own expense a suitable and convenient place for holding the district court at Washington, at Laurinburg, and at Wilson until a courthouse shall be constructed by the United States. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Raleigh, at Wilmington, at Newbern, at Elizabeth City, at Washington, at Laurinburg, and at Wilson, which shall be kept open at all times for the transaction of the business of the court.

The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alamance, Alexander, Ashe, Alleghany, Anson, Buncombe, Burke, Caswell, Cabarrus, Catawba, Cleveland, Caldwell, Clay, Cherokee, Davidson, Davie, Forsyth, Guilford, Gaston, Graham, Henderson, Haywood, Iredell, Jackson, Lincoln, Montgomery, Mecklenburg, Mitchell, McDowell, Madison, Macon, Orange, Polk, Randolph, Rockingham, Rowan, Rutherford, Stanly, Stokes, Surry, Swain, Transylvania, Union, Wilkes, Watauga, Yadkin, and Yancey. Terms of the district court for the western district shall be held in Greensboro on the first Mondays in June and December; at Statesville on the third Mondays in April and October; at Salisbury on the fourth Mondays in April and October; at Asheville on the first Mondays in May and November; at Charlotte on the first Mondays in April and October; and at Wilkesboro on the fourth Mondays in May and November. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Greensboro, at Asheville, at Statesville, and at Wilkesboro, which shall be kept open at all times for the transaction of the business of the court. (38 Stats. 728.)

Act of April 27, 1916. (North Carolina eastern judicial district—Additional terms.) That two additional terms of the district court, for the trial of civil cases, for the eastern district of North Carolina shall be held at Raleigh, North Carolina, on the first Monday in March and the first Monday in September. (Pamphlet Supp. Fed. Stats. Ann., title, "Judiciary," No. 7, p. 13.)

§ 99, as Amended Act of July 17, 1916, c. 248. That the State of North Dakota shall constitute one judicial district, to be known as the district of North Dakota. The territory embraced on the first day of January, nineteen hundred and sixteen, in the counties of Burleigh, Logan, McIntosh, Emmons, Kidder, McLean, Adams, Bowman, Dunn, Hettinger, Morton, Stark, Golden Valley, Slope, Sioux, Oliver, Mercer, Billings, and McKenzie shall constitute the southwestern division of said district; and

the territory embraced on the date last mentioned in the counties of Cass, Richland, Barnes, Sargent, Ransom, and Steele shall constitute the southeastern division; and the territory embraced on the date last mentioned in the counties of Grand Forks, Traill, Walsh, Pembina, Cavalier, and Nelson shall constitute the northeastern division; and the territory embraced on the date last mentioned in the counties of Ramsey, Benson, Towner, Rolette, Bottineau, Pierce, and McHenry shall constitute the northwestern division; and the territory embraced on the date last mentioned in the counties of Ward, Williams, Divide, Montrail, Burke, and Renville shall constitute the western division; and the territory embraced on the date last mentioned in the counties of Griggs, Foster, Eddy, Wells, Sheridan, Stutsman, Lamoure, and Dickey shall constitute the central division. The several Indian reservations and parts thereof within said State shall constitute a part of the several divisions within which they are respectively situated. Terms of the district court for the southwestern division shall be held at Bismarck on the first Tuesday in March; for the southeastern division, at Fargo, on the third Tuesday in May; for the northeastern division, at Grand Forks, on the second Tuesday in November; for the northwestern division, at Devils Lake on the first Tuesday in July; for the western division, at Minot on the second Tuesday in October; and for the central division, at Jamestown on the second Tuesday in April. The clerk of the court shall maintain an office in charge of himself or a deputy at each place at which court is held in his district: *Provided,* That the Government of the United States shall incur no expense for rent, light, heat, water, or janitor service for the building in which court shall be held until such time as the Government may erect its own court room." (Fed. Stats. Ann., 2d ed., 1918 Supp., title, "Judiciary," Pamph. Supp. No. 8, October, 1916, p. 129; 2 U. S. Comp. Stats. 1916, § 1086, p. 1258.)

§ 100, as Amended Act of March 4, 1915, c. 159. The State of Ohio is divided into two judicial districts, to be known as the northern and southern districts of Ohio. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Ashland, Ashtabula, Cuyahoga, Carroll, Columbiana, Crawford, Geauga, Holmes, Lake, Lorain, Medina, Mahoning, Portage, Richland, Summit, Stark, Tuscarawas, Trumbull and Wayne, which shall constitute the eastern division; also the territory embraced on the date last mentioned in the counties of Auglaize, Allen, Defiance, Erie, Fulton, Henry, Hancock, Hardin, Huron, Lacas, Mercer, Marion, Ottawa, Paulding, Putnam, Seneca, Sandusky, Van Wert, Williams, Wood, and Wyandot, which shall constitute the western division of said district. Terms

of the district court for the eastern division shall be held at Cleveland on the first Tuesdays in February, April, and October, and at Youngstown on the first Tuesday after the first Monday in March; and for the western division, at Toledo on the last Tuesdays in April and October. Grand and petit jurors summoned for service at a term of court to be held at Cleveland may, if in the opinion of the court the public convenience so requires, be directed to serve also at the term then being held or authorized to be held at Youngstown. Crimes and offenses committed in the eastern division shall be cognizable at the terms held at Cleveland or at Youngstown, as the court may direct. Any suit brought in the eastern division may, in the discretion of the court, be tried at the term held at Youngstown. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Green, Hamilton, Highland, Lawrence, Miami, Montgomery, Preble, Scioto, Shelby, and Warren, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Athens, Belmont, Coshocton, Delaware, Fairfield, Fayette, Franklin, Gallia, Guernsey, Harrison, Hocking, Jackson, Jefferson, Knox, Licking, Logan, Madison, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble, Perry, Pickaway, Pike, Ross, Union, Vinton, and Washington, which shall constitute the eastern division of said district. Terms of the district court for the western division shall be held at Cincinnati on the first Tuesdays in February, April, and October; and for the eastern division at Columbus on the first Tuesdays in June and December, and at Steubenville on the first Tuesdays of March and September. Grand and petit jurors summoned for service at a term of court being held at Columbus may, if in the opinion of the court the public convenience so requires, be directed to serve also at the term being held or authorized to be held at Steubenville. Crimes and offenses committed in the eastern division shall be cognizable at the terms held at Columbus, or at Steubenville, as the court may direct. Any suit brought in the eastern division may, in the discretion of the court, be tried at the term held at Steubenville: *Provided,* That suitable rooms and accommodations for holding court at Steubenville shall be furnished free of expense to the Government until the completion of the Federal building; And *provided further,* That terms of the district court for the southern district shall be held at Dayton on the first Mondays in May and November. Prosecutions for crimes and offenses committed in any part of said district shall also be cognizable at the terms held at Dayton. All suits which may be brought within the southern district, or either division thereof, may be instituted, tried, and determined at the

terms held at Dayton. (38 Stats. 1187; 2 U. S. Comp. Stats. 1916, § 1087.)

§ 101, as Amended Act Feb. 20, 1917, c. 102. The State of Oklahoma is divided into two judicial districts, to be known as the eastern and western districts of Oklahoma. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and sixteen, in the counties of Adair, Atoka, Bryant, Craig, Cherokee, Creek, Choctaw, Coal, Carter, Delaware, Garvin, Grady, Haskell, Hughes, Johnston, Jefferson, Latimer, Le Flore, Love, McClain, Mayes, Muskogee, McIntosh, McCurtain, Murray, Marshall, Nowata, Ottawa, Okmulgee, Okfuskee, Pittsburg, Pushmataha, Pontotoc, Rogers, Stephens, Sequoyah, Seminole, Tulsa, Washington, and Wagoner. Terms of the district court for the eastern district shall be held at Muskogee on the first Monday in January; at Vinita, on the first Monday in March; at Tulsa, on the first Monday in April; at South McAlester, on the first Monday in June, at Ardmore, on the first Monday in October; and at Chickasha, on the first Monday in November in each year. The western district shall include the territory embraced on the first day of July, nineteen hundred and sixteen, in the counties of Alfalfa, Beaver, Beckham, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Osage, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods, and Woodward. Terms of the district court for the western district shall be held at Guthrie on the first Monday in January; at Oklahoma City, on the first Monday in March; at Enid, on the first Monday in June; at Lawton, on the first Monday in September; and at Woodward, on the first Monday in November: *Provided,* That suitable rooms and accommodations for holding court at Woodward are furnished free of expense to the United States. The clerk of the district court for the eastern district shall keep his office at Muskogee and the clerk for the western district at Guthrie, and shall maintain an office in charge of himself or a deputy at Oklahoma City. (Fed. Stats. Ann., 2d ed., Pamphlet Supp. Nos. 9-10, January-April, 1917, pp. 64, 65, 1918 Supp., title, "Judiciary," Supp. 2 U. S. Comp. Stats. 1916, § 1088, Adv. Sheets 239, Fed. No. 1, p. 57.)

§ 102 (Re-enacting § 531, Rev. Stats.). The state of Oregon shall constitute one judicial district, to be known as the district of Oregon. Terms of the district court shall be held at Portland on the first Mondays in March, July, and November; at Pendleton on the first Tuesday in April; and at Medford on the first Tuesday in October. The marshal and the

clerk for said district shall each appoint, in the manner provided by law, at least one deputy at Pendleton and one at Medford, who shall reside and maintain an office at each of said places. (5 Fed. Stats. Ann., 2d ed., p. 585; 2 U. S. Comp. Stats. 1916, § 1089.)

§ 103, as Amended Act of Sept. 9, 1914, c. 296. That the State of Pennsylvania is divided into three judicial districts, to be known as the eastern, middle, and western districts of Pennsylvania. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia, and Schuylkill. Terms of the district court shall be held at Philadelphia on the second Mondays in March and June, the third Monday in September, and the second Monday in December, each term to continue until the succeeding term begins. The middle district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Bradford, Cameron, Carbon, Center, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, and York. Terms of the district court shall be held at Scranton on the second Monday in March and the third Monday in October; at Harrisburg on the first Mondays in May and December; at Sunbury on the second Monday in January; and at Williamsport on the first Monday in June. The clerk of the court for the middle district shall maintain an office, in charge of himself or a deputy, at Harrisburg; the civil suits instituted at that place shall be tried there, if either party resides nearest that place of holding court, unless by consent of parties they are removed to another place for trial. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington, and Westmoreland. Terms of the district court shall be held at Pittsburgh on the first Monday of May and the second Monday of November, and terms of the court shall be held at Erie on the third Monday of March and the third Monday of September. The clerk and marshal of said district shall have their principal offices at Pittsburgh, and shall maintain, by themselves or by their deputies, offices at Erie.

The clerk shall place all cases in which the defendants reside in the counties of said district nearest Erie upon the trial list for trial at Erie,

where the same shall be tried, unless the parties thereto stipulate that the same may be tried at Pittsburgh. (38 Stats. 713; 5 Fed. Stats. Ann., 2d ed., p. 585; 2 U. S. Comp. Stats. 1916, § 1090.)

§ 104 (Re-enacting § 531, Rev. Stats., as Amended Feb. 1, 1912, c. 27.) The state of Rhode Island shall constitute one judicial district, to be known as the district of Rhode Island; terms of the district court shall be held at Providence on the fourth Tuesday in May and the third Tuesday in November. (5 Fed. Stats. Ann., 2d ed., p. 586; 2 U. S. Comp. Stats. 1916, § 1091.)

§ 105 (Re-enacting § 546, Rev. Stats., as Amended February 5, 1912, c. 28.) The state of South Carolina is divided into two districts, to be known as the eastern and western districts of South Carolina. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Abbeville, Anderson, Cherokee, Chester, Edgefield, Fairfield, Greenville, Greenwood, Lancaster, Laurens, Newberry, Oconee, Pickens, Saluda, Spartanburg, Union, and York. Terms of the district court for the western district shall be held at Greenville on the third Tuesdays in April and October. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Aiken, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Chesterfield, Clarendon, Colleton, Darlington, Dillon, Dorchester, Florence, Georgetown, Hampton, Horry, Kershaw, Lee, Lexington, Marion, Marlboro, Orangeburg, Richland, Sumter, and Williamsburg. Terms of the district court for the eastern district shall be held at Charleston on the first Tuesdays in June and December; at Columbia on the third Tuesday in January and the first Tuesday in November, the latter term to be solely for the trial of civil cases; and at Florence on the first Tuesday in March. The offices of the clerk of the district court shall be at Greenville, and at Charleston; and the clerk shall reside in one of said cities and have a deputy in the other. (5 Fed. Stats. Ann., 2d ed., p. 587; 2 U. S. Comp. Stats. 1916, § 1092.)

Act of March 3, 1915, c. 100, § 1.

§ 1. (South Carolina districts—Additional district judge.) That there shall be a district judge for the eastern district of South Carolina and a district judge for the western district of South Carolina, who shall be appointed as district judges are appointed in other judicial districts of the United States: *Provided,* That the President, previous to appointing said judge, shall make public all indorsements of the applicants for said

position. The present district judge, who is a resident of the eastern district of South Carolina, is hereby assigned to said eastern district as the district judge thereof. (38 Stats. 961; 1 U. S. Comp. Stats. 1916, § 968e.

§ 2. (Pending causes—By whom heard.) That all causes of a civil nature and motions therein submitted and all causes and proceedings of a civil nature, including proceedings in bankruptcy, now pending in the western district of South Carolina in which the evidence has been taken in whole or in part before the present district judge for the eastern and western districts of South Carolina, or taken in whole or in part and submitted to and passed upon by the said district judge, shall be retained by said judge and proceeded with and disposed of by said judge, who may for that purpose continue to exercise jurisdiction in the said western district. (38 Stats. 961; 1 U. S. Comp. Stats. 1916, § 968f.)

§ 3. (Additional district attorney.) That there shall be a district attorney for the eastern district of South Carolina and a district attorney for the western district of South Carolina, who shall be appointed as district attorneys are appointed in other judicial districts of the United States. The district attorney for the eastern district of South Carolina and the district attorney for the western district of South Carolina shall each receive an annual salary of $4,500. The present district attorney, who is a resident of the eastern district of South Carolina, is hereby assigned to said eastern district as the district attorney thereof. (38 Stats. 961; 2 U. S. Comp. Stats. 1916, § 1362a.)

§ 4. (Additional marshal.) That there shall be a marshal for the eastern district of South Carolina and a marshal for the western district of South Carolina, who shall be appointed as marshals are appointed in other judicial districts of the United States. The marshal for the eastern district of South Carolina and the marshal for the western district of South Carolina shall each receive an annual salary of $4,500. The present marshal, who is a resident of the eastern district of South Carolina, is hereby assigned to said eastern district as the marshal thereof. (38 Stats. 961; 2 U. S. Comp. Stats. 1916, § 1362b.)

§ 5 as Amended Act Sept. 1, 1916, c. 434. (Terms—Office of clerk.) That terms of the district court for the eastern district shall be held at Charleston on the first Tuesdays in June and December; at Columbia on the third Tuesday in January, and first Tuesday in November; at Florence, first Tuesday in March; and at Aiken, on the first Tuesday in April and October. Terms of the district court of the western district shall be held

at Greenville on the first Tuesday in April and the first Tuesday in October; at Rock Hill, the second Tuesday in March and September; and at Greenwood, the first Tuesday in February and November; and at Anderson, the fourth Tuesday in May and November. The office of the clerk of the district court for the western district shall be at Greenville and the office of the clerk of the district court for the eastern district shall be at Charleston. (38 Stats. 961; 2 U. S. Comp. Stats. 1916, § 1092a.)

§ 106 (Re-enacting act of November 3, 1893, c. 10). The state of South Dakota shall constitute one judicial district, to be known as the district of South Dakota. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Aurora, Beadle, Bon Homme, Brookings, Brule, Charles Mix, Clay, Davison, Douglas, Gregory, Hanson, Hutchinson, Kingsbury, Lake, Lincoln, McCook, Miner, Minnehaha, Moody, Sanborn, Turner, Union, and Yankton, and in the Yankton Indian reservation, shall constitute the southern division of said district; the territory embraced on the date last mentioned in the counties of Brown, Campbell, Clark, Codington, Corson, Day, Deuel, Edmunds, Grant, Hamlin, McPherson, Marshall, Roberts, Schnasse, Spink, and Walworth, and in the Sisseton and Wahpeton Indian reservation, and in that portion of the Standing Rock Indian reservation lying in South Dakota, shall constitute the northern division; the territory embraced on the date last mentioned in the counties of Armstrong, Buffalo, Dewey, Faulk, Hand, Hughes, Hyde, Jerauld, Lyman, Potter, Stanley, and Sully, and in the Cheyenne River, Lower Brule, and Crow Creek Indian reservations, shall constitute the central division; and the territory embraced on the date last mentioned in the counties of Bennett, Butte, Custer, Fall River, Harding, Lawrence, Meade, Mellette, Pennington, Perkins, Shannon, Todd, Tripp, Washabaugh, and Washington, and in the Rosebud and Pine Ridge Indian reservations, shall constitute the western division. Terms of the district court for the southern division shall be held at Sioux Falls on the first Tuesday in April and the third Tuesday in October; for the northern division, at Aberdeen on the first Tuesday in May and the second Tuesday in November; for the central division, at Pierre on the second Tuesday in June and the first Tuesday in October; and for the western division, at Deadwood on the third Tuesday in May and the first Tuesday in September. The clerk of the district court shall maintain an office in charge of himself or a deputy at Sioux Falls, at Pierre, at Aberdeen, and at Deadwood, which shall be kept open for the transaction of the business of the court. (5 Fed. Stats. Ann., 2d ed., p. 588; 2 U. S. Comp. Stats. 1916, § 1093.)

§ 107. (Re-enacting § 547, Rev. Stats.), as Amended Act August 20, 1912, c. 306. The state of Tennessee is divided into three districts, to be known as the eastern, middle, and western districts of Tennessee. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bledsoe, Bradley, Hamilton, James, McMinn, Marion, Meigs, Polk, Rhea, and Sequatchie, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Anderson, Blount, Campbell, Claiborne, Grainger, Jefferson, Knox, Loudon, Monroe, Morgan, Roane, Sevier, Scott, and Union, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Carter, Cocke, Greene, Hamblen, Hancock, Hawkins, Johnson, Sullivan, Unicoi, and Washington, which shall constitute the northeastern division of said district. Terms of the district court for the southern division of said district shall be held at Chattanooga on the fourth Monday in April and the second Monday in November; for the northern division, at Knoxville on the fourth Monday in May and the first Monday in December; and for the northeastern division, at Greeneville on the first Monday in March and the third Monday in September. The middle district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bedford, Cannon, Cheatham, Coffee, Davidson, Dickson, Franklin, Giles, Grundy, Hickman, Humphreys, Houston, Lawrence, Lewis, Lincoln, Marshall, Maury, Montgomery, Moore, Robertson, Rutherford, Stewart, Sumner, Trousdale, Warren, Wayne, Williamson, and Wilson, which shall constitute the Nashville division of said district; also the territory embraced on the date last mentioned in the counties of Clay, Cumberland, Dekalb, Fentress, Jackson, Macon, Overton, Pickett, Putnam, Smith, Van Buren, and White, which shall constitute the northeastern division of said district. Terms of the district court for the Nashville division of said district shall be held at Nashville on the second Monday in March and the fourth Monday in September; and for the northeastern division, at Cookeville on the third Monday in April and the first Monday in November: *Provided,* That suitable accommodations for holding court at Cookeville shall be provided by the county or municipal authorities without expense to the United States. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Dyer, Fayette, Haywood, Lauderdale, Shelby, and Tipton, which shall constitute the western division of said district; also the territory embraced on the date last mentioned in the counties of Benton, Carroll, Chester, Crockett, Decatur, Gibson, Hardeman, Hardin, Hender-

son, Henry, Lake, McNairy, Madison, Obion, Perry, and Weakley, including the waters of the Tennessee River to low-water mark on the eastern shore thereof wherever such river forms the boundary line between the western and middle districts of Tennessee, from the north line of the state of Alabama north to the point in Henry county, Tennessee, where the south boundary line of the state of Kentucky strikes the east bank of the river, which shall constitute the eastern division of said district. Terms of the district court for the western division of said district shall be held at Memphis on the fourth Mondays in May and November; and for the eastern division, at Jackson on the fourth Mondays in April and October. The clerk of the court for the western district shall appoint a deputy who shall reside at Jackson. The marshal for the western district shall appoint a deputy who shall reside at Jackson. The marshal for the eastern district shall appoint a deputy who shall reside at Chattanooga. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Knoxville, at Chattanooga and at Greenville, which shall be kept open at all times for the transaction of the business of the court." (Fed. Stats. Ann., 2d ed., p. 589; 2 U. S. Comp. Stats. 1916, § 1094.)

§ 108 (Re-enacting act of March 11, 1902, c. 183). "The state of Texas is divided into four districts to be known as the northern, eastern, western, and southern districts of Texas. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Dallas, Ellis, Hunt, Johnson, Kaufman, Navarro, and Rockwall, which shall constitute the Dallas division; also the territory embraced on the date last mentioned in the counties of Archer, Baylor, Clay, Comanche, Erath, Foard, Hardeman, Hood, Jack, Palo Pinto, Parker, Tarrant, Wichita, Wilbarger, Wise, and Young, which shall constitute the Fort Worth division; also the territory embraced on the date last mentioned in the counties of Armstrong, Bailey, Briscoe, Carson, Castro, Childress, Cochran, Collingsworth, Cottle, Crosby, Dallam, Deaf Smith, Dickens, Donley, Floyd, Gray, Hale, Hall, Hansford, Hartley, Hemphill, Hockley, Hutchinson, King, Lamb, Lipscomb, Lubbock, Moore, Motley, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher, and Wheeler, which shall constitute the Amarillo division; also the territory embraced on the date last mentioned in the counties of Andrews, Borden, Callahan, Dawson, Eastland, Fisher, Gaines, Garza, Haskell, Howard, Jones, Kent, Knox, Lynn, Martin, Midland, Mitchell, Nolan, Scurry, Shackelford, Stephens, Stonewall, Taylor, Terry, Throck- and Yoakum, which shall constitute the Abilene division; also the embraced on the date last mentioned in the counties of Brown,

ke, Coleman, Concho, Crockett, Glasscock, Irion, Menard, Mills, Runls, Schleicher, Sterling, Sutton, Tom Greene, and Upton, which shall nstitute the San Angelo division of the said district. Terms of the strict court for the Dallas division shall be held at Dallas on the second onday in January and the first Monday in May; for the Fort Worth vision, at Fort Worth on the first Monday in November and the second onday in March; for the Amarillo division, at Amarillo on the third onday in April and the fourth Monday in September; for the Abilene vision, at Abilene on the first Monday in October and the second Monday April; and for the San Angelo division, at San Angelo on the third onday in October and the fourth Monday in April. The clerk of the urt for the northern district shall maintain an office in charge of himlf or a deputy at Dallas, at Fort Worth, at Amarillo, at Abilene, and at an Angelo, which shall be kept open at all times for the transaction of e business of the court. The eastern district shall include the territory nbraced on the first day of July, nineteen hundred and ten, in the counes of Anderson, Angelina, Cherokee, Gregg, Henderson, Houston, acogdoches, Panola, Rains, Rusk, Smith, Van Zandt, and Wood, which all constitute the Tyler division; also the territory embraced on the ate last mentioned in the counties of Hardin, Jasper, Jefferson, Liberty, ewton, Orange, Sabine, San Augustine, Shelby, and Tyler, which shall nstitute the Beaumont division; also the territory embraced on the ate last mentioned in the counties of Collin, Cook, Denton, Grayson, and ontague, which shall constitute the Sherman division; also the territory nbraced on the date last mentioned in the counties of Camp, Cass, Harson, Hopkins, Marion, Morris and Upshur, which shall constitute the efferson division; also the territory embraced on the date last mentioned the counties of Delta, Fannin, Red River, and Lamar, which shall conitute the Paris division; also the territory embraced on the date last entioned in the counties of Bowie, Franklin, and Titus, which shall nstitute the Texarkana division. Terms of the district court for the yler division shall be held at Tyler on the fourth Mondays in January nd April; for the Jefferson division, at Jefferson on the first Monday October and the third Monday in February; for the Beaumont division, t Beaumont on the third Monday in November and the first Monday in pril; for the Sherman division, at Sherman on the first Monday in anuary and the third Monday in May; for the Paris division, at Paris n the third Monday in October and the first Monday in March; and for he Texarkana division, at Texarkana on the third Monday in March nd the first Monday in November. The clerk of the court for the eastern istrict shall maintain an office in charge of himself or a deputy at Sh-

man, at Beaumont, and at Texarkana, which shall be kept open at all times for the transaction of the business of said court. The western district [see amendment below] shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bastrop, Blanco, Burleson, Burnet, Caldwell, Gillespie, Hays, Kimble, Lampasas, Lee, Llano, Mason, McCulloch, San Saba, Travis, Washington, and Williamson, which shall constitute the Austin division; also the territory embraced on the date last mentioned in the counties of Atascosa, Bandera, Bexar, Comal, Dimmit, Edwards, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Medina, and Wilson, which shall constitute the San Antonio division; also the territory embraced on the date last mentioned in the counties of Brewster, Crane, Ector, El Paso, Jeff Davis, Loving, Reeves, Presidio, Ward, and Winkler, which shall constitute the El Paso division; also the territory embraced on the date last mentioned in the counties of Bell, Bosque, Coryell, Falls, Hamilton, Freestone, Hill, Leon, Limestone, McLennan, Milam, Robertson, and Somervell, which shall constitute the Waco division; also the territory embraced on the date last mentioned in the counties of Kinney, Maverick, Pecos, Terrell, Uvalde, Valverde, and Zavalla, which shall constitute the Del Rio division. Terms of the district court for the Austin division shall be held at Austin on the fourth Monday in January and the second Monday in June; for the Waco division, at Waco on the fourth Monday in February and the second Monday in November; for the San Antonio division, at San Antonio on the first Monday in May and the third Monday in December; for the El Paso division, at El Paso on the first Monday in April and the first Monday in October; and for the Del Rio division, at Del Rio on the third Monday in March and the fourth Monday in October. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Austin, El Paso, and at Del Rio, which shall be kept open at all times for the transaction of business. The southern district [see amendment below] shall include the territory embraced on the first of July, nineteen hundred and ten, in the counties of Duval, La Salle, McMullen, Nueces, Webb, and Zapata, which shall constitute the Laredo division; also the territory embraced on the date last mentioned in the counties of Cameron, Hidalgo, and Starr, which shall constitute the Brownsville division; also the territory embraced on the date last mentioned in the counties of Austin, Brazoria, Chambers, Galveston, Fort Bend, Matagorda, and Wharton, which shall constitute the Galveston division; also the territory embraced on the date last mentioned in the counties of Brazos, Colorado, Fayette, Grimes, Harris, Lavaca, Madison, Montgomery, Polk, San Jacinto, Trinity, Walker, and Waller, which shall

constitute the Houston division; also the territory embraced on the date last mentioned in the counties of Bee, Calhoun, Dewitt, Goliad, Jackson, Live Oak, Refugio, Aransas, San Patricio, and Victoria, which shall constitute the Victoria division. Terms of the district court for the Galveston division shall be held at Galveston on the second Monday in January and the first Monday in June; for the Houston division, at Houston on the fourth Mondays in February and September; for the Laredo division, at Laredo on the third Monday in April and the second Monday in November; for the Brownsville division, at Brownsville on the second Monday in May and the first Monday in December; and for the Victoria division, at Victoria on the first Monday in May and the fourth Monday in November. The clerk of the court for the southern district shall maintain an office in charge of himself or a deputy at each of the places now designated for holding court in said district. (2 U. S. Comp. Stats. 1916, § 1095.)

Act February 5, 1913, c. 28, creates a new division of the western district. That the counties of Reeves, Ward, Martin, Regan, Winkler, Ector, Gaines, Andrews, Upton, Midland, Loving, Jeff Davis, and Crane shall constitute a division of the western judicial district of Texas. (37 Stats. 663; 2 U. S. Comp. Stats. 1916, § 1098.)

Sec. 2. That terms of the district court of the United States for the said western district of Texas shall be held twice in each year at the city of Pecos, in Reeves county, and that, until otherwise provided by law, the judge of said court shall fix the times at which said court shall be held at Pecos, of which he shall make proclamation and give due notice: *Provided, however,* That suitable rooms and accommodations shall be furnished for the holding of said court and for the use of the officers of said court at Pecos, free of expense to the government of the United States. (2 U. S. Comp. Stats. 1916, § 1099.)

Act May 29, 1912, c. 144, creates a new division of the southern district. That the counties of Bee, Live Oak, Aransas, San Patricio, Nueces, Jim Wells, Duval, Brooks, and Willacy shall constitute a division of the southern judicial district of Texas. (37 Stats. 120; 2 U. S. Comp. Stats. 1916, § 1096.)

"Sec. 2. That terms of the district court of the United States for the said southern district of Texas shall be held twice in each year at the city of Corpus Christi, in Nueces county, and that, until otherwise provided by law, the judge of said court shall fix the times at which said court shall be held at Corpus Christi, of which he shall make publication

and give due notice. (5 Fed. Stats. Ann., 2d ed., p. 1096; 2 U. S. Comp. Stats. 1916, § 1097.)

§ 1, Act Feb. 26, 1917, c. 122. Additional division in northern district. That the counties of Archer, Baylor, Clay, Cottle, Foard, Montague, King, Knox, Wichita, Wilbarger, and Young shall constitute a division of the northern judicial district of Texas.

§ 2. Additional terms of court for northern district; office of clerk. That terms of the district court of the United States for the said northern district of Texas shall be held twice each year at the city of Wichita Falls, in Wichita County, on the fourth Monday in March and the third Monday in November. The clerk of the court for the northern district of Texas shall maintain an office in charge of himself or a deputy at Wichita Falls, which shall be kept open at all times for the transaction of the business of the court: *Provided*, That suitable accommodations for holding court at Wichita Falls shall be provided by the county or municipal authorities without expense to the United States. (Fed. Stats. Ann., 2d ed., 1918 Supp., title "Judiciary"; Pamphlet Supp. Nos. 9–10, January-April, 1917, p. 66; U. S. Comp. Stats. 1916, Supp., §§ 1095a, 1095b, Adv. Sheets, 239 Fed. No. 4, p. 57.)

Act Feb. 26, 1917, c. 120, provides for an additional district judge for western district of Texas.

That the President of the United States, by and with the advice and consent of the Senate, shall appoint an additional judge of the district court of the United States for the Western District of Texas, who shall possess the same powers, perform the same duties, and receive the same compensation and allowance as the present judge of said district, and whose official place of residence shall be maintained at El Paso until otherwise provided by law. (1918 Supp. Fed. Stats. Ann., title "Judiciary"; U. S. Comp. Stats. § 968h; Adv. Sheets, 239 Fed. No. 1.)

§ 109 (Re-enacting 28 Stats. 110, with amendment thereto, 29 Stats. 620). The state of Utah shall constitute one judicial district, to be known as the district of Utah. It is divided into two divisions, to be known as the northern and central divisions. The northern division shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Boxelder, Cache, Davis, Morgan, Rich, and Weber. The central division shall include the territory embraced on the date last mentioned in the counties of Beaver, Carbon, Emery, Garfield, Grand, Iron, Juab, Kane, Millard, Piute, Salt Lake, San Juan, San Pete, Sevier, Summit, Tooele, Uinta, Utah, Wasatch, Washington, and Wayne.

Terms of the district court for the northern division shall be held at Ogden on the second Mondays in March and September; and for the central division, at Salt Lake City on the second Mondays in April and November. The clerk of the court for said district shall maintain an office in charge of himself or a deputy at each of the places where the court is now required to be held in the district. (5 Fed. Stats. Ann., 2d ed., p. 593; 2 U. S. Comp. Stats. 1916, § 1100.)

§ 110 (Re-enacting § 531, Rev. Stats., as Amended Feb. 1, 1912, c. 26). The state of Vermont shall constitute one judicial district, to be known as the district of Vermont. Terms of the district court shall be held at Burlington on the fourth Tuesday in February, at Windsor on the third Tuesday in May, at Rutland on the first Tuesday in October, and at Brattleboro on the third Tuesday in December. In each year one of the stated terms of the district court may, when adjourned, be adjourned to meet at Montpelier, and one at Newport; *Provided, however,* That suitable rooms and accommodations shall be furnished for the holdings for said court and for the use of the officers of said court at Brattleboro, free of expense to the government of the United States, until the public building provided for by act of Congress shall be erected. (5 Fed. Stats. Ann., 2d ed., p. 594; 2 U. S. Comp. Stats. 1916, § 1101.)

§ 111 (Re-enacting § 549, Rev. Stats.). The state of Virginia is divided into two districts, to be known as the eastern and western districts of Virginia. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Accomac, Alexandria, Amelia, Brunswick, Caroline, Charles City, Chesterfield, Culpepper, Dinwiddie, Elizabeth City, Essex, Fairfax, Fauquier, Gloucester, Goochland, Greensville, Hanover, Henrico, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Loudoun, Louisa, Lunenberg, Mathews, Mecklenburg, Middlesex, Nansemond, New Kent, Norfolk, Northampton, Northumberland, Nottoway, Orange, Powhatan, Prince Edward, Prince George, Prince William, Princess Anne, Richmond, Southampton, Spottsylvania, Stafford, Surry, Sussex, Warwick, Westmoreland, and York. Terms of the district court shall be held at Richmond on the first Mondays in April and October; at Norfolk on the first Mondays in May and November; and at Alexandria on the first Mondays in January and July. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alleghany, Albermarle, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetourt, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Cumberland, Dick-

enson, Floyd, Fluvanna, Franklin, Frederick, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Madison, Montgomery, Nelson, Page, Patrick, Pulaski, Pittsylvania, Rappahannock, Roanoke, Rockbridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Tazewell, Warren, Washington, Wise, and Wythe. Terms of the district court shall be held at Lynchburg on the Tuesdays after the second Mondays in March and September; at Danville on the Tuesdays after the second Mondays in April and November; at Abingdon on the Tuesdays after the first Mondays in May and October; at Harrisonburg on the Tuesdays after the first Mondays in June and December; at Charlottesville on the second Monday in January and the first Monday in July; at Roanoke on the third Monday in February and the third Monday in June; and at Big Stone Gap on the fourth Monday in January and the second Monday in August. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Lynchburg, at Danville, at Charlottesville, at Roanoke, at Abingdon, and at Big Stone Gap, which shall be kept open at all times for the transactions of business of the court. (5 Fed. Stats. Ann., 2d ed., p. 594; 2 U. S. Comp. Stats. 1916, § 1102.)

§ 112. (Re-enacting act of April 5, 1890, c. 65, 25 Stats. 45). The state of Washington is divided into two districts, to be known as the eastern and western district of Washington. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Spokane, Stevens, Ferry, Okanogan, Chelan, Grant, Douglas, Lincoln, and Adams, with the waters thereof, including all Indian reservations within said counties, which shall constitute the northern division; also the territory embraced on the date last mentioned in the counties of Asotin, Garfield, Whitman, Columbia, Franklin, Walla Walla, Benton, Klickitat, Kittitas, and Yakima, with the waters thereof, including all Indian reservations within said counties, which shall constitute the southern division of said district. Terms of the district court for the northern division shall be held at Spokane on the first Tuesdays in April and September; for the southern division, at Walla Walla on the first Tuesdays in June and December, and at North Yakima, on the first Tuesdays in May and October. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Whatcom, Skagit, Snohomish, King, San Juan, Island, Kitsap, Clallam, and Jefferson, with the waters thereof, including all Indian reservations within said counties, which shall constitute the northern division; also the territory embraced on the date last mentioned in the counties of Pierce, Mason, Thurston, Chehalis, Pacific, Lewis, Wahkiakum, Cowlitz, Clarke, and Skamania, with the waters thereof, including

all Indian reservations within said counties, which shall constitute the southern division of said district. Terms of the district court for the northern division shall be held at Bellingham on the first Tuesdays in April and October; at Seattle on the first Tuesdays in May and November; and for the southern division, at Tacoma on the first Tuesdays in February and July. The clerks of the courts for the eastern and western districts shall maintain an office in charge of himself or a deputy at each place in their respective districts where terms of court are now required to be held. (5 Fed. Stats. Ann., 2d ed., p. 595; 2 U. S. Comp. Stats. 1916, § 1103.)

§ 113, as Amended Act Aug. 22, 1914, c. 265. The State of West Virginia is divided into two districts, to be known as the northern and southern districts of West Virginia. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Hancock, Brooke, Ohio, Marshall, Tyler, Pleasants, Wood, Wirt, Ritchie, Doddridge, Wetzel, Monangalia, Marion, Harrison, Lewis, Gilmer, Calhoun, Upshur, Barbour, Taylor, Preston, Tucker, Randolph, Pendleton, Hardy, Grant, Mineral, Hampshire, Morgan, Berkeley, and Jefferson, with the waters thereof. Terms of the district court for the northern district shall be held at Martinsburg on the first Tuesday of April and the third Tuesday of September; at Clarksburg on the second Tuesday of April and the first Tuesday of October; at Wheeling on the first Tuesday of May and the third Tuesday of October; at Philippi on the fourth Tuesday of May and the second Tuesday of November; at Elkins on the first Tuesday in July and the first Tuesday in December; and at Parkersburg on the second Tuesday of January and the second Tuesday of June; *Provided,* That a place for holding court at Philippi shall be furnished free of cost to the United States by Barbour County until other provision is made therefor by law: *And provided further,* That a place for holding court at Elkins shall be furnished free of cost to the United States by Randolph County until other provision is made therefor by law. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Jackson, Roane, Clay, Braxton, Webster, Nicholas, Pocahontas, Greenbrier, Fayette, Boone, Kanawha, Putnam, Mason, Cabell, Wayne, Lincoln, Logan, Mingo, Raleigh, Wyoming, McDowell, Mercer, Summers, and Monroe, with the waters thereof. Terms of the district court for the southern district shall be held at Charleston on the first Tuesday of June and the third Tuesday of November; at Huntington on the first Tuesday of April and the first Tuesday after the third Monday of September; at Bluefield on

the first Tuesday of May and the third Tuesday of October; at Williamson on the first Tuesday of October; at Webster Springs on the first Tuesday of September; and at Lewisburg on the second Tuesday of July: *Provided*, That a place for holding court at Webster Springs shall be furnished free of cost to the United States: *And provided further*, That a place for holding court at Williamson shall be furnished free of cost to the United States by Mingo County until other provision is made therefor by law. (38 Stats. 702; 5 Fed. Stats. Ann., 2d ed., p. 596; 2 U. S. Comp. Stats. 1916, § 1104.)

§ 114 (Re-enacting § 550, Rev. Stats.). The state of Wisconsin is divided into two districts, to be known as the eastern and western districts of Wisconsin. The eastern districts shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Brown, Calumet, Dodge, Door, Florence, Fond du Lac, Forest, Green Lake, Kenosha, Kewaunee, Langlade, Manitowoc, Marinette, Marquette, Milwaukee, Oconto, Outagamie, Ozaukee, Racine, Shawano, Sheboygan, Walworth, Washington, Waukesha, Waupaca, Waushara, and Winnebago. Terms of the district court for said district shall be held at Milwaukee on the first Mondays in January and October; at Oshkosh on the second Tuesday in June; and at Green Bay on the first Tuesday in April. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Columbia, Crawford, Dane, Dunn, Douglas, Eau Claire, Grant, Green, Iowa, Iron, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Lincoln, Marathon, Monroe, Oneida, Pepin, Pierce, Polk, Portage, Price, Richland, Rock, Rusk, Saint Croix, Sauk, Sawyer, Taylor, Tremepealeau, Vernon, Vilas, Washburn, and Wood. Terms of the district court for said district shall be held at Madison on the first Tuesday in December; at Eau Claire on the first Tuesday in June; at La Crosse on the third Tuesday in September; and at Superior on the fourth Tuesday in January and the second Tuesday in July. The district court for each of said districts shall be open at all times for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction, so far as the same can be done without a jury. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Madison, at La Crosse, and at Superior, which shall be kept open at all times for the transaction of the business of the court. The marshal for the western district shall appoint a deputy marshal who shall reside and keep his office at Superior. All writs and other process, except criminal warrants, issued at Superior, may be made

returnable at Superior; and the clerk at that place shall keep in his office the original records of all actions, prosecutions, and special proceedings so commenced and pending therein. Criminal warrants may be returned at any place within the district where court is held. Whenever warrants issued at Superior shall be returned at any other place, the clerk of the court wherein the warrant is returned, shall certify the same, under the seal of the court, together with the plea and other proceedings had thereon, and the determination of the court upon such plea or proceedings, with all papers and orders filed in reference thereto, to the clerk of the court at Superior; and the clerk at Superior shall enter upon his records a minute of the proceedings had upon the return of said warrant, certified as aforesaid. All causes and proceedings instituted in the court at Superior, shall be tried therein, unless by consent of the parties, or upon the order of the court, they are transferred to another place for trial. (5 Fed. Stats. Ann., 2d ed., p. 597; 2 U. S. Comp. Stats. 1916, § 1105.)

§ 115 (Re-enacting 26 Stats. 225). The state of Wyoming and the Yellowstone National Park shall constitute one judicial district, to be known as the district of Wyoming. Terms of the district court for said district shall be held at Cheyenne on the second Mondays in May and November; at Evanston on the second Tuesday in July; and at Lander on the first Monday in October; and the said court shall hold one session annually at Sheridan, and in said national park, on such dates as the court may order. The marshal and clerk of the said court shall each, respectively, appoint at least one deputy to reside at Evanston, and one to reside at Lander, unless he himself shall reside there, and shall also maintain an office at each of those places: *Provided,* That until a public building is provided at Lander, suitable accommodations for holding court in said town shall be furnished the government at an expense not to exceed three hundred dollars annually. The marshal of the United States for the said district may appoint one or more deputy marshals for the Yellowstone National Park, who shall reside in said park. (5 Fed. Stats. Ann., 2d ed., p. 598; 2 U. S. Comp. Stats. 1916, § 1106.)

CHAPTER SIX.

CIRCUIT COURTS OF APPEALS.

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§ 116 (Including § 604, Rev. Stats.). There shall be nine judicial circuits of the United States, constituted as follows:

First. The first circuit shall include the districts of Rhode Island, Massachusetts, New Hampshire, Maine, and Porto Rico. (Amendment Act Jan. 28, 1915, c. 22.)

Second. The second circuit shall include the districts of Vermont, Connecticut, and New York.

Third. The third circuit shall include the districts of Pennsylvania, New Jersey, and Delaware.

Fourth. The fourth circuit shall include the districts of Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

Fifth. The fifth circuit shall include the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.

Sixth. The sixth circuit shall include the districts of Ohio, Michigan, Kentucky, and Tennessee.

Seventh. The seventh circuit shall include the districts of Indiana, Illinois, and Wisconsin.

Eighth. The eighth circuit shall include the districts of Nebraska, Minnesota, Iowa, Missouri, Kansas, Arkansas, Colorado, Wyoming, North Dakota, South Dakota, Utah, and Oklahoma.

Ninth. The ninth circuit shall include the districts of California, Oregon, Nevada, Washington, Idaho, Montana, and Hawaii. (36 Stats. 1131; 5 Fed. Stats. Ann., 2d ed., p. 599; 2 U. S. Comp. Stats. 1916, § 1107; Foster's Federal Practice, 5th ed., pp. 8, 9. In general, Barrett v. United States, 169 U. S. 218, 42 L. Ed. 723, 18 Sup. Ct. 327.)

§ 117 (Re-enacting 26 Stats. 826). There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record, with appellate jurisdiction as hereinafter limited and established. (36 Stats. 1131; 5 Fed. Stats. Ann., 2d ed., p. 600; 2 U. S. Comp. Stats. 1916, § 1108.)

§ 118 (Superseding § 2, Act of March 3, 1891, 26 Stats. 826). There shall be in the second, seventh, and eighth circuits, respectively, four circuit judges, in the fourth circuit, two circuit judges, and in each of the other circuits, three circuit judges, to be appointed by the President, by and with the advice and consent of the Senate. They shall be entitled to receive a salary at the rate of seven thousand dollars a year, each, payable monthly. Each circuit judge shall reside within his circuit. The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law: *Provided*, That nothing in this section shall be construed to prevent any circuit judge holding district court or serving in the commerce court, or otherwise, as provided for and authorized in other sections of this act. (36 Stats. 1131, as amended by 37 Stats. 53; 5 Fed. Stats. Ann., 2d ed., p. 601; 2 U. S. Comp. Stats. 1916, § 1109.)

§ 119 (Superseding § 606, Rev. Stats.). The Chief Justice and associate justices of the Supreme Court shall be allotted among the circuits by an order of the court, and a new allotment shall be made whenever it becomes necessary or convenient by reason of the alteration of any circuit, or of the new appointment of a Chief Justice or associate justice, or otherwise. If a new allotment becomes necessary at any other time than during a term, it shall be made by the Chief Justice, and shall be binding until the next term and until a new allotment by the court. Whenever, by reason of death or resignation, no justice is allotted to a circuit, the Chief Justice may, until a justice is regularly allotted thereto, temporarily assign a justice of another circuit to such circuit. (36 Stats. 1131; 5 Fed. Stats. Ann., 2d ed., p. 602; 2 U. S. Comp. Stats. 1916, § 1111.)

§ 120 (Re-enacting § 3, Act March 3, 1891, c. 217, 26 Stats. 827). The Chief Justice and the associate justices of the Supreme Court assigned to each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits. In case the Chief Justice or an associate justice of the Supreme Court shall attend at any session of the circuit court of appeals, he shall preside. In the absence of such Chief Justice, or associate justice, the circuit judges in attendance upon the court shall preside in the order of the seniority of their respective commissions. In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: *Provided,* That no judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals. (36 Stats. 1132; 5 Fed. Stats. Ann., 2d ed., p. 602; 2 U. S. Comp. Stats. 1916, § 1112; Foster's Federal Practice, 5th ed., pp. 2417, 2539.) A decree in which a disqualified judge took part will be quashed and set aside without regard to its merits. (Moran v. Dillingham, 174 U. S. 153, 43 **L. Ed.** 930, 19 Sup. Ct. 620.)

§ 121 (Re-enacting § 605, Rev. Stats.). The words "circuit justice" and "justice of a circuit," when used in this title, shall be understood to designate the justice of the Supreme Court who is allotted to any circuit; but the word "judge," when applied generally to any circuit, shall be understood to include such justice. (36 Stats. 1132; 5 Fed. Stats. Ann., 2d ed., p. 604; 2 U. S. Comp. Stats. 1916, § 1113.)

§ 122 (Re-enacting part of § 2, Act of March 3, 1891, c. 517, 26 Stats. 826). Each of said circuit courts of appeals shall prescribe the form and style of its seal, and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction; and shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law. (36 Stats. 1132; 5 Fed. Stats. Ann., 2d ed., p. 604; 2 U. S. Comp. Stats. 1916, § 1114; Bradford v. Southern Ry. Co., 195 U. S. 243, 49 **L. Ed.** 178, 25 Sup. Ct. 55.)

§ 123 (Superseding part of § 32, Act of March 3, 1891, c. 517, 26 Stats. 826). The United States marshals in and for the several districts of

said courts shall be the marshals of said circuit courts of appeals, and shall exercise the same powers and perform the same duties, under the regulations of the court, as are exercised and performed by the marshal of the Supreme Court of the United States, so far as the same may be applicable. (36 Stats. 1132; 5 Fed. Stats. Ann., 2d ed., p. 604; 2 U. S. Comp. Stats. 1916, § 1115.)

§ 124 (Re-enacting part of § 2, Act of March 3, 1891, c. 517, 26 Stats. 826). Each court shall appoint a clerk, who shall exercise the same powers and perform the same duties in regard to all matters within its jurisdiction, as are exercised and performed by the clerk of the Supreme court, so far as the same may be applicable. (36 Stats. 1132; 5 Fed. Stats. Ann., 2d ed., p. 605; 2 U. S. Comp. Stats. 1916, § 1116. In general, Morton v. U. S., 59 Fed. 349.)

§ 125 (New legislation). The clerk of the circuit court of appeals for each circuit may, with the approval of the court, appoint such number of deputy clerks as the court may deem necessary. Such deputies may be removed at the pleasure of the clerk appointing them, with the approval of the court. In case of the death of the clerk his deputy or deputies shall, unless removed by the court, continue in office and perform the duties of the clerk in his name until a clerk is appointed and has qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties on his official bond shall be liable, and his executor or administrator shall have such remedy for such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime. (36 Stats. 1132; 5 Fed. Stats. Ann., 2d ed., p. 605; 2 U. S. Comp. Stats. 1916, § 1117.)

§ 126 (Re-enacting 26 Stats. 827). A term shall be held annually by the circuit courts of appeals in the several judicial circuits at the following places, and at such times as may be fixed by said courts, respectively: In the first circuit, in Boston; in the second circuit, in New York; in the third circuit, in Philadelphia; in the fourth circuit, in Richmond; in the fifth circuit, in New Orleans, Atlanta, Fort Worth, and Montgomery; in the sixth circuit, in Cincinnati; in the seventh circuit, in Chicago; in the eighth circuit, in Saint Louis, Denver, or Cheyenne, and Saint Paul; in the ninth circuit, in San Francisco, and each year in two other places in said circuit to be designated by the judges of said court; and in each of the above circuits, terms may be held at such other times and in such other places as said courts, respectively, may from time to time designate: *Provided,* That terms shall be held in Atlanta on the first Monday in October,

in Fort Worth on the first Monday in November, in Montgomery on the third Monday in October, in Denver or in Cheyenne on the first Monday in September, and in Saint Paul on the first Monday in May. All appeals, writs of error, and other appellate proceedings which may be taken or prosecuted from the district courts of the United States in the state of Georgia, in the state of Texas, and in the state of Alabama, to the circuit court of appeals for the fifth judicial circuit shall be heard and disposed of, respectively, by said court at the terms held in Atlanta, in Fort Worth, and in Montgomery, except that appeals or writs of error in cases of injunctions and in all other cases which, under the statutes and rules, or in the opinion of the court, are entitled to be brought to a speedy hearing may be heard and disposed of wherever said court may be sitting. All appeals, writs of errors, and other appellate proceedings which may hereafter be taken or prosecuted from the district court of the United States at Beaumont, Texas, to the circuit court of appeals for the fifth circuit, shall be heard and disposed of by the said circuit court of appeals at the terms of court held at New Orleans: *Provided,* That nothing herein shall prevent the court from hearing appeals or writs of error wherever the said court shall sit, in cases of injunctions and in all other cases which, under the statutes and the rules, or in the opinion of the court, are entitled to be brought to a speedy hearing. All appeals, writs of error, and other appellate proceedings which may be taken or prosecuted from the district courts of the United States in the states of Colorado, Utah, and Wyoming, and the supreme court of the Territory of New Mexico to the circuit court of appeals for the eighth judicial circuit, shall be heard and disposed of by said court at the terms held either in Denver or in Cheyenne, except that any case arising in any of said states or territory may, by consent of all the parties, be heard and disposed of at a term of said court other than the one held in Denver or Cheyenne. (36 Stats. 1132; 5 Fed. Stats. Ann., 2d ed., p. 605; 2 U. S. Comp. Stats. 1916, § 1118; Foster's Federal Practice, 5th ed., p. 11.)

Act of July 17, 1916, c. 241.

[*Circuit Court of Appeals—Fourth Circuit—Additional term.*] That the judges of the United States Circuit Court of Appeals for the Fourth Circuit shall annually open and hold a term of the court of said circuit at Asheville, North Carolina, at such time as may be fixed by the judges thereof. (Fed. Stats. Ann., 2d ed., 1918 Supp., title "Judiciary"; Pamphlet Supp. No. 8, October 1916, p. 129; 2 U. S. Comp. Stats. 1916, § 1118a, p. 1388.)

§ 127 (Re-enacting part of 26 Stats. 829). The marshals for the several districts in which said circuit courts of appeals may be held shall, under the direction of the Attorney General, and with his approval, provide such rooms in the public buildings of the United States as may be necessary for the business of said courts, and pay all incidental expenses of said court, including criers, bailiffs, and messengers: *Provided,* That in case proper rooms cannot be provided in such buildings, then the marshals, with the approval of the Attorney General, may, from time to time, lease such rooms as may be necessary for such courts. (36 Stats. 1133.)

§ 128, as Amended Act of Jan. 28, 1915, c. 22. The circuit court of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii and the United States district court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the trade-mark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in all admiralty cases. (38 Stats. 803.)

§ 129. Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the circuit court of appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: *Provided,* That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof, during the pendency of such appeal: *Provided, however,* That the court below may, in its discretion, require as a condition of the appeal an additional bond.

§ 130. The circuit courts of appeals shall have the appellate and supervisory jurisdiction conferred upon them by the act entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved July first, eighteen hundred and ninety-eight, and all laws amendatory thereof, and shall exercise the same in the manner therein prescribed.

§ 131. The circuit court of appeals for the ninth circuit is empowered to hear and determine writs of error and appeals from the United States court for China, as provided in the act entitled "An Act Creating a United States Court for China and Prescribing the Jurisdiction thereof," approved June thirtieth, nineteen hundred and six.

§ 132. Any judge of a circuit court of appeals, in respect of cases brought or to be brought before that court, shall have the same powers and duties as to allowances of appeals and writs of error, and the conditions of such allowances, as by law belong to the justices or judges in respect of other courts of the United States, respectively.

§ 133 (Re-enacting § 15, C. C. A. Act 1891). The circuit courts of appeals, in cases in which their judgments and decrees are made final by this title, shall have appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of Arizona and New Mexico, as by this title they may have to review the judgments, orders, and decrees of the district courts; and for that purpose said territories shall, by orders of the Supreme Court of the United States, to be made from time to time, be assigned to particular circuits. (36 Stats. 1134.)

This section is superseded by reason of the territories of Arizona and New Mexico having been admitted as states, by proclamation of the President and acts of Congress, all of which are cited in paragraphs following Judicial Code, §§ 70 and 96, respectively, and are set forth in the title "States."

§ 134. In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section two hundred and forty-seven, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases, writs of error and appeals shall lie from the district court for Alaska or from any division thereof, to the circuit court of appeals for the ninth circuit, and the judgments, orders, and decrees of said court shall be final in all such cases. But whenever such circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have

arisen in any such case, the court may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instructions shall be binding upon the circuit court of appeals.

§ 135. All appeals, and writs of error, and other cases, coming from the district court for the district of Alaska to the circuit court of appeals for the ninth circuit, shall be entered upon the docket and heard at San Francisco, California, or at Portland, Oregon, or at Seattle, Washington, as the trial court before whom the case was tried below shall fix and determine: *Provided,* That at any time before the hearing of any appeal, writ of error, or other case, the parties thereto, through their respective attorneys, may stipulate at which of the above-named places the same shall be heard, in which case the case shall be remitted to and entered upon the docket at the place so stipulated and shall be heard there.

CHAPTER SEVEN.

THE COURT OF CLAIMS.

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§ 136 (Re-enacting § 1049, Rev. Stats.). The court of claims, established by the act of February twenty-fourth, eighteen hundred and fifty-five, shall be continued. It shall consist of a chief justice and four judges, who shall be appointed by the President, by and with the advice and con-

sent of the Senate, and hold their offices during good behavior. Each of them shall take an oath to support the Constitution of the United States, and to discharge faithfully the duties of his office. The chief justice shall be entitled to receive an annual salary of six thousand five hundred dollars, and each of the other judges an annual salary of six thousand dollars, payable monthly, from the Treasury. (36 Stats. 1135; 5 Fed. Stats. Ann., 2d ed., p. 646; 2 U. S. Comp. Stats. 1916, § 1127.)

§ 137 (Re-enacting § 1050, Rev. Stats.). The court of claims shall have a seal, with such device as it may order. (5 Fed. Stats. Ann., p. 647; 2 U. S. Comp. Stats. § 1128; Taylor v. U. S., 45 Fed. 531.)

§ 138 (Re-enacting § 1052, Rev. Stats.). The court of claims shall hold one annual session at the city of Washington, beginning on the first Monday in December and continuing as long as may be necessary for the prompt disposition of the business of the court. Any three of the judges of said court shall constitute a quorum, and may hold a court for the transaction of business: *Provided,* That the concurrence of three judges shall be necessary to the decision of any case. (36 Stats. 1136; 5 Fed. Stats. Ann., 2d ed., p. 647; 2 U. S. Comp. Stats. 1916, § 1129; Foster's Federal Practice, 5th ed., p. 2342.)

§ 139 (Re-enacting § 1053, Rev. Stats.). The said court shall appoint a chief clerk, an assistant clerk, if deemed necessary, a bailiff, and a chief messenger. The clerks shall take an oath for the faithful discharge of their duties, and shall be under the direction of the court in the performance thereof; and for misconduct or incapacity they may be removed by it from office; but the court shall report such removals, with the cause thereof, to Congress, if in session, or if not, at the next session. The bailiff shall hold his office for a term of four years, unless sooner removed by the court for cause. (36 Stats. 1136; 5 Fed. Stats. Ann., 2d ed., p. 647; 2 U. S. Comp. Stats. 1916, § 1130; Foster's Federal Practice, 5th ed., p. 2300.)

§ 140 (Re-enacting § 1054, Rev. Stats.). The salary of the chief clerk shall be three thousand five hundred dollars a year; of the assistant clerk two thousand five hundred dollars a year; of the bailiff one thousand five hundred dollars a year, and of the chief messenger one thousand dollars a year, payable monthly from the Treasury. (36 Stats. 1136.)

§ 141 (Re-enacting § 1055, Rev. Stats.). The chief clerk shall give bond to the United States in such amount, in such form, and with such security as shall be approved by the Secretary of the Treasury. (36 Stats. 1136.)

§ 142. The said clerk shall have authority when he has given bond as provided in the preceding section, to disburse, under the direction of the court, the contingent fund which may from time to time be appropriated for its use; and his accounts shall be settled by the proper accounting officers of the Treasury in the same way as the accounts of other disbursing agents of the government are settled. (36 Stats. 1136; 5 Fed. Stats. Ann., 2d ed., p. 648; 2 U. S. Comp. Stats. 1916, § 1133; Foster's Federal Practice, 5th ed., p. 2300.)

§ 143 (Re-enacting § 1057, Rev. Stats.). On the first day of every regular session of Congress, the clerk of the court of claims shall transmit to Congress a full and complete statement of all the judgments rendered by the court during the previous year, stating the amounts thereof and the parties in whose favor they were rendered, together with a brief synopsis of the nature of the claims upon which they were rendered. At the end of every term of the court he shall transmit a copy of its decisions to the heads of departments; to the Solicitor, the Comptroller, and the Auditors of the Treasury; to the Commissioner of the General Land Office and of Indian Affairs; to the chiefs of bureaus, and to other officers charged with the adjustment of claims against the United States. (36 Stats. 1136; 5 Fed. Stats. Ann., 2d ed., p. 648; 2 U. S. Comp. Stats. 1916, § 1134.)

§ 144 (Re-enacting § 1058, Rev. Stats.). Whoever, being elected or appointed a Senator, Member of, or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment, and either before or after he has qualified, and during his continuation in office, practice in the court of claims, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, thereafter be incapable of holding any office of honor, trust, or profit under the government of the United States. (36 Stats. 1136; 5 Fed. Stats. Ann., 2d ed., p. 649; 2 U. S. Comp. Stats. 1916, § 1135; Foster's Federal Practice, 5th ed., p. 2329.)

§ 145 (Including §§ 1059, 1069, Rev. Stats. As to jurisdiction.) The court of claims shall have jurisdiction to hear and determine the following matters:

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party

would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same.

Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court: *Provided,* That no suit against the government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this chapter until an account for said fees shall have been rendered and finally acted upon as required by law, unless the proper accounting officer of the Treasury fails to act finally thereon within six months after the account is received in said office.

Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of loss by capture or otherwise, while in the line of his duty, of government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible. (36 Stats. 1136; 5 Fed. Stats. Ann., 2d ed., p. 649; 2 U. S. Comp. Stats. 1916, § 1136; Foster's Federal Practice, 5th ed., pp. 2301, 2305; United States v. Pitts Co., 193 Fed. 905, 114 C. C. A. 119.)

§ 146 (Re-enacting § 1061, Rev. Stats.). Upon the trial of any cause in which any set-off, counter-claim, claim for damages, or other demand is set up on the part of the government against any person making claim against the government in said court, the court shall hear and determine such claim or demand both for and against the government and claimant; and if upon the whole case it finds that the claimant is indebted to the government it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law. Any transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records thereof, and shall thereby become and be a judgment of such court and be enforced as other judgments in such court are enforced. (36 Stats. 1137; 5 Fed. Stats. Ann., 2d ed., p. 660; 2 U. S. Comp. Stats. 1916, § 1137; Foster's Federal Prac-

tice, 5th ed., p. 2305. In general, Wisconsin Cent. R. R. Co. v. United States, 164 U. S. 190, 41 **L. Ed.** 406, 17 Sup. Ct. 45.)

§ 147 (Re-enacting § 1062, Rev. Stats.). Whenever the court of claims ascertains the facts of any loss by any paymaster, quartermaster, commissary of subsistence, or other disbursing officer, in the cases hereinbefore provided, to have been without fault or negligence on the part of such officer, it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the Treasury shall allow to such officer the amount so decreed as a credit in the settlement of his accounts. (36 Stats. 1137; 5 Fed. Stats. Ann., 2d ed., p. 661; 2 U. S. Comp. Stats. 1916, § 1138; Foster's Federal Practice, 5th ed., p. 2306. In general, McClure v. United States, 116 U. S. 145, 29 **L. Ed.** 572, 6 Sup. Ct. 321.)

§ 148 (Drawn from § 1063). When any claim or matter is pending in any of the executive departments which involves controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, documents, and proofs pertaining thereto, to the court of claims and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted for its guidance and action: *Provided, however,* That if it shall have been transmitted with the consent of the claimant, or if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, in the latter case giving to either party such further opportunity for hearing as in its judgment justice shall require, and shall report its findings therein to the department by which the same was referred to said court. The Secretary of the Treasury may, upon the certificate of any auditor, or of the Comptroller of the Treasury, direct any claim or matter, of which, by reason of the subject-matter or character, the said court might under existing laws, take jurisdiction on the voluntary action of the claimant, to be transmitted, with all the vouchers, papers, documents and proofs pertaining thereto, to the said court for trial and adjudication. (36 Stats. 1137; 5 Fed. Stats. Ann., 2d ed., p. 662; 2 U. S. Comp. Stats. 1916, § 1139. In general, U. S. v. Barlow, 184 U. S. 123, 46 **L. Ed.** 463, 22 Sup. Ct. 468.)

§ 149 (Re-enacting § 1064, Rev. Stats.). All cases transmitted by the head of any department, or upon the certificate of any auditor, or of the Comptroller of the Treasury, according to the provisions of the preceding

section, shall be proceeded in as other cases pending in the court of claims, and shall, in all respects, be subject to the same rules and regulations. (36 Stats. 1138; 5 Fed. Stats. Ann., 2d ed., p. 664; 2 U. S. Comp. Stats. 1916, § 1140. Procedure in referred cases, United States v. New York, 160 U. S. 598, 40 L. Ed. 551, 16 Sup. Ct. 402.)

§ 150 (Re-enacting § 1065, Rev. Stats.). The amount of any final judgment or decree rendered in favor of the claimant, in any case transmitted to the court of claims under the two preceding sections, shall be paid out of any specific appropriation applicable to the case, if any such there be; and where no such appropriation exists, the judgment or decree shall be paid in the same manner as other judgments of the said court. (36 Stats. 1138; 5 Fed. Stats. Ann., 2d ed., p. 664; 2 U. S. Comp. Stats. 1916, § 1141; Foster's Federal Practice, 5th ed., p. 2310.)

§ 151 (Re-enacting Act, March 3, 1887, c. 359). Whenever any bill, except for a pension, is pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may, for the investigation and determination of facts, refer the same to the court of claims, which shall proceed with the same in accordance with such rules as it may adopt and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitations should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy, together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, legally or equitably due from the United States to the claimant: *Provided, however,* That if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter, the subject-matter of the bill is such that it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and it shall report its proceedings therein to the House of Congress by which the same was referred to said court. (36 Stats. 1138; 5 Fed. Stats. Ann., 2d ed., p. 665; 2 U. S. Comp. Stats. 1916, § 1142; Foster's Federal Practice, 5th ed., p. 2312.)

§ 152 (Re-enacting § 15 of Act of March 3, 1889, c. 359, 24 Stats. 508). If the government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court. (36 Stats. 1138; 5 Fed. Stats. Ann., 2d ed., p. 677; 2 U. S. Comp. Stats. 1916, § 1143; Foster's Federal Practice, 5th ed., p. 2352. Costs, United States v. Harmon, 147 U. S. 268, 37 **L. Ed.** 164, 13 Sup. Ct. 327.)

§ 153 (Re-enacting § 1066, Rev. Stats.). The jurisdiction of the said court shall not extend to any claim against the government not pending therein on December first, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes. (36 Stats. 1138; 5 Fed. Stats. Ann., 2d ed., p. 667; 2 U. S. Comp. Stats. 1916, § 1144; Foster's Federal Practice, 5th ed., p. 2308. In general, Pam-To-Pee v. United States, 148 U. S. 691, 37 **L. Ed.** 613, 13 Sup. Ct. 742.)

§ 154 (Re-enacting § 1067, Rev. Stats.). No person shall file or prosecute in the court of claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States. (36 Stats. 1138; 5 Fed. Stats. Ann., 2d ed., p. 667; 2 U. S. Comp. Stats. 1916, § 1145. In general, United States v. Louisiana, 123 U. S. 32, 31 **L. Ed.** 69, 8 Sup. Ct. 17.)

§ 155 (Re-enacting § 1068, Rev. Stats.). Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the court of claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction. (36 Stats. 1139; 5 Fed. Stats. Ann., 2d ed., p. 668; 2 U. S. Comp. Stats. 1916, § 1146; Foster's Federal Practice, 5th ed., p. 2309. Aliens, United States v. Winchester & Potomac R. R. Co., 163 U. S. 244, 41 **L. Ed.** 145, 16 Sup. Ct. 993.)

§ 156 (Re-enacting § 1069, Rev. Stats.). Every claim against the United States cognizable by the court of claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representa-

tives, as provided by law, within six years after the claim first accrues: *Provided,* That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. (36 Stats. 1139; 5 Fed. Stats. Ann., 2d ed., p. 668; 2 U. S. Comp. Stats. 1916, § 1147; Foster's Federal Practice, 5th ed., p. 2314.)

§ 157 (Re-enacting § 1070, Rev. Stats.). The said court shall have power to establish rules for its government and for the regulation of practice therein, and it may punish for contempt in the manner prescribed by the common law, may appoint commissioners, and may exercise such powers as are necessary to carry into effect the powers granted to it by law. (36 Stats. 1139; 5 Fed. Stats. Ann., 2d ed., p. 671; 2 U. S. Comp. Stats. 1916, § 1148. Practice, Intermingled Cotton Cases, 92 U. S. 651, 23 **L. Ed.** 756.)

§ 158 (Re-enacting § 1071, Rev. Stats.). The judges and clerks of said court may administer oaths and affirmations, taking acknowledgments of instruments in writing, and give certificates of the same. (36 Stats. 1139; 5 Fed. Stats. Ann., 2d ed., p. 672; 2 U. S. Comp. Stats. 1916, § 1149; Foster's Federal Practice, 5th ed., p. 2312.)

§ 159 (Re-enacting § 1072, Rev. Stats.). The claimant shall in all cases fully set forth in his petition the claim, the action thereon in Congress or by any of the departments, if such action has been had, what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of said claim or of any part thereof or interest therein has been made, except as stated in the petition, that said claimant is justly entitled to the amount therein claimed from the United States after allowing all just credits and off-sets; that the claimant and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, and that he believes the facts as stated in the said petition to be true. The said petition shall be verified by the affidavit of the claimant, his agent or attorney. (36 Stats. 1139; 5 Fed. Stats. Ann., 2d ed., p. 672; 2 U. S. Comp. Stats.

1916, § 1150; Foster's Federal Practice, 5th ed., p. 2316. In general, United States v. Louisiana, 123 U. S. 32, 31 L. Ed. 69, 8 Sup. Ct. 17.)

§ 160 (Re-enacting § 1073, Rev. Stats.). The said allegations as to true allegiance and voluntary aiding, abetting, or giving encouragement to rebellion against the government may be traversed by the government, and if on the trial such issues shall be decided against the claimant, his petition shall be dismissed. (36 Stats. 1139; 5 Fed. Stats. Ann., 2d ed., p. 673; 2 U. S. Comp. Stats. 1916, § 1151.)

§ 161 (Re-enacting part of § 1074, Rev. Stats.). Whenever it is material in any claim to ascertain whether any person did or did not give any aid or comfort to forces or government of the late Confederate States during the Civil War, the claimant asserting the loyalty of any such person to the United States during such Civil War shall be required to prove affirmatively that such person did, during said Civil War, consistently adhere to the United States and did give no aid or comfort to persons engaged in said Confederate service in said Civil War. (36 Stats. 1139; 5 Fed. Stats. Ann., 2d ed., p. 673; 2 U. S. Comp. Stats. 1916, § 1152; Foster's Federal Practice, 5th ed., p. 2330.)

§ 162 (Drawn from § 1059, Rev. Stats.). The court of claims shall have jurisdiction to hear and determine the claims of those whose property was taken subsequent to June the first, eighteen hundred and sixty-five, under the provisions of the act of Congress approved March twelfth, eighteen hundred and sixty-three, entitled "An Act to Provide for the Collection of Abandoned Property and for the Prevention of Frauds in Insurrectionary Districts within the United States," and acts amendatory thereof, where the property so taken was sold and the net proceeds thereof was placed in the Treasury of the United States; and the Secretary of the Treasury shall return said net proceeds to the owners thereof, on the judgment of said court, and full jurisdiction is given to said court to adjudge said claims, any statutes of limitations to the contrary notwithstanding. (36 Stats. 1139; 5 Fed. Stats. Ann., 2d ed., p. 673; 2 U. S. Comp. Stats. 1916, § 1153; Foster's Federal Practice, 5th ed., p. 2312. In general, Austin v. United States, 155 U. S. 417, 39 L. Ed. 206, 15 Sup. Ct. 167.)

§ 163 (Re-enacting § 1075, Rev. Stats.). The court of claims shall have power to appoint commissioners to take testimony to be used in the investigation of claims which come before it, to prescribe the fees which they shall receive for their services, and to issue commissions for the taking of such testimony, whether taken at the instance of the claim-

ant or of the United States. (36 Stats. 1140; 5 Fed. Stats. Ann., 2d ed., p. 674; 2 U. S. Comp. Stats. 1916, § 1154; Foster's Federal Practice, 5th ed., p. 2330.)

§ 164 (Re-enacting § 1076, Rev. Stats.). The said court shall have power to call upon any of the departments for any information or papers it may deem necessary, and shall have the use of all recorded and printed records made by the committees of each House of Congress, when deemed necessary in the prosecution of its business. But the head of any department may refuse and omit to comply with any call for information or papers when, in his opinion, such compliance would be injurious to the public interest. (36 Stats. 1140; 5 Fed. Stats. Ann., 2d ed., p. 674; 2 U. S. Comp. Stats. 1916, § 1155. In general, Oakes v. United States, 174 U. S. 778, 43 **L. Ed.** 1169, 19 Sup. Ct. 864.)

§ 165 (Re-enacting § 1077, Rev. Stats.). When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not authorize the taking of any testimony therein. (36 Stats. 1140; 5 Fed. Stats. Ann., 2d ed., p. 675; 2 U. S. Comp. Stats. 1916, § 1156; Foster's Federal Practice, 5th ed., p. 2330.)

§ 166 (Re-enacting § 1080, Rev. Stats.). The court may, at the instance of the attorney or solicitor appearing in behalf of the United States, make an order in any case pending therein, directing any claimant in such case to appear, upon reasonable notice, before any commissioner of the court and be examined on oath touching any or all matters pertaining to said claim. Such examination shall be reduced to writing by the said commissioner, and be returned to and filed in the court, and may, at the discretion of the attorney or solicitor of the United States appearing in the case, be read and used as evidence on the trial thereof. And if any claimant, after such order is made and due and reasonable notice thereof is given to him, fails to appear, or refuses to testify or answer fully as to all matters within his knowledge material to the issue, the court may, in its discretion, order that the said cause shall not be brought forward for trial until he shall have fully complied with the order of the court in the premises. (36 Stats. 1140; 5 Fed. Stats. Ann., 2d ed., p. 675; 2 U. S. Comp. Stats. 1916, § 1157; Foster's Federal Practice, 5th ed., 2331. In general, United States v. Greathouse, 166 U. S. 601, 41 **L. Ed.** 1130, 17 Sup. Ct. 701.)

§ 167 (Re-enacting § 1081, Rev. Stats.). The testimony in cases pending before the court of claims shall be taken in the county where the

witness resides, when the same can be conveniently done. (36 Stats. 1140; 5 Fed. Stats. Ann., 2d ed., p. 676; 2 U. S. Comp. Stats. 1916, § 1158; Foster's Federal Practice, 5th ed., p. 2331.)

§ 168 (Re-enacting § 1082, Rev. Stats.). The court of claims may issue subpoenas to require the attendance of witnesses in order to be examined before any person commissioned to take testimony therein. Such subpoenas shall have the same force as if issued from a district court, and compliance therewith shall be compelled under such rules and orders as the court shall establish. (36 Stats. 1140; 5 Fed. Stats. Ann., 2d ed., p. 676; 2 U. S. Comp. Stats. 1916, § 1159; Foster's Federal Practice, 5th ed., p. 2332.)

§ 169 (Re-enacting § 1082, Rev. Stats.). In taking testimony to be used in support of any claim, opportunity shall be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as said court shall prescribe; and like opportunity shall be afforded the claimant, in cases where testimony is taken on behalf of the United States, under like regulations. (36 Stats. 1140; 5 Fed. Stats. Ann., 2d ed., p. 676; 2 U. S. Comp. Stats. 1916, § 1160; Foster's Federal Practice, 5th ed., pp. 2310, 2331.)

§ 170 (Re-enacting § 1084, Rev. Stats.). The commissioner taking testimony to be used in the court of claims shall administer an oath or affirmation to the witness brought before him for examination. (36 Stats. 1140; 5 Fed. Stats. Ann., 2d ed., p. 677; 2 U. S. Comp. Stats. 1916, § 1161; Foster's Federal Practice, 5th ed., p. 2331.)

§ 171 (Re-enacting § 1085, Rev. Stats.). When testimony is taken for the claimant, the fees of the commissioner before whom it is taken, and the cost of the commission and notice, shall be paid by such claimant; and when it is taken at the instance of the government, such fees shall be paid out of the contingent fund provided for the court of claims, or other appropriation made by Congress for that purpose. (36 Stats. 1141; 5 Fed. Stats. Ann., 2d ed., p. 677; 2 U. S. Comp. Stats. 1916, § 1162.)

§ 172 (Re-enacting § 1086, Rev. Stats.). Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance of any claim or of any part of any claim against the United States shall, *ipso facto*, forfeit the same to the government; and it shall be the duty of the court of claims, in such cases, to find specifically that such fraud was practiced or

attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the government, and that the claimant be forever barred from prosecuting the same. (36 Stats. 1141; 5 Fed. Stats. Ann., 2d ed., p. 677; 2 U. S. Comp. Stats. 1916, § 1163; Foster's Federal Practice, 5th ed., p. 2349.)

§ 173 (Re-enacting § 2 of Act of April 30, 1878, c. 77). No claim shall be allowed by the accounting officers under the provisions of the act of Congress approved June sixteen, eighteen hundred and seventy-four, or by the court of claims, or by Congress, to any person where such claimant, or those under whom he claims, shall willfully, knowingly, and with intent to defraud the United States, have claimed more than was justly due in respect of such claim, or presented any false evidence to Congress, or to any department or court, in support thereof. (36 Stats. 1141; 5 Fed. Stats. Ann., 2d ed., p. 678; 2 U. S. Comp. Stats. 1916, § 1164.)

§ 174 (Re-enacting § 1087, Rev. Stats.). When judgment is rendered against any claimant, the court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial. (36 Stats. 1141; 5 Fed. Stats. Ann., 2d ed., p. 678; 2 U. S. Comp. Stats. 1916, § 1165; Foster's Federal Practice, 5th ed., p. 2345; Nance v. United States, 23 Ct. Cl. 463; Payan's Motion, 15 Ct. Cl. 56.)

§ 175 (Re-enacting § 1088, Rev. Stats.). The court of claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion, on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law. (36 Stats. 1141; 5 Fed. Stats. Ann., 2d ed., p. 678; 2 U. S. Comp. Stats. 1916, § 1166; Foster's Federal Practice, 5th ed., p. 2345. In general, Landers v. United States, 210 U. S. 168, 42 L. Ed. 1007, 28 Sup. Ct. 661; Henry's Motion, 15 Ct. Cl. 166; McCollum v. United States, 33 Ct. Cl. 469; United States v. Young, 94 U. S. 258, 24 L. Ed. 153; United States v. Crussell, 12 Wall. 175, 20 L. Ed. 384; Young v. United States, 95 U. S. 641, 24 L. Ed. 467.)

§ 176 (Drawn from Act of March 3, 1877, c. 105). There shall be taxed against the losing party in each and every cause pending in the court of claims the cost of printing the record in such case, which shall

be collected, except when the judgment is against the United States, by the clerk of said court and paid into the Treasury of the United States. (36 Stats. 1141; 5 Fed. Stats. Ann., 2d ed., p. 680; 2 U. S. Comp. Stats. 1916, § 1167; Foster's Federal Practice, 5th ed., p. 2352.)

§ 177 (Re-enacting § 1091, Rev. Stats.). No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the court of claims, unless upon a contract expressly stipulating for the payment of interest. (36 Stats. 1141; 5 Fed, Stats. Ann., 2d ed., p. 680; 2 U. S. Comp. Stats. 1916, § 1168; Foster's Federal Practice, 5th ed., p. 2350. In general, United States ex rel. Augerica v. Bayard, 127 U. S. 251, 32 L. Ed. 159, 8 Sup. Ct. 1156.)

§ 178 (Re-enacting § 1092, Rev. Stats.). The payment of the amount due by any judgment of the court of claims, and of any interest thereon allowed by law, as provided by law, shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy. (36 Stats. 1141; 5 Fed. Stats. Ann., 2d ed., p. 681; 2 U. S. Comp. Stats. 1916, § 1169.)

§ 179 (Re-enacting § 1092, Rev. Stats.). Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy. (36 Stats. 1141; 5 Fed. Stats. Ann., 2d ed., p. 681; 2 U. S. Comp. Stats. 1916, § 1170; Foster's Federal Practice, 5th ed., p. 2351.)

§ 180 (Drawn from §§ 3 and 8 of the Tucker Act of March 3, 1887, c. 359). Whenever any person shall present his petition to the court of claims alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety, or personal representative of any officer or agent or contractor so indebted, or that he or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States had arisen and exists, and that he or the person he represents has applied to the proper department of the government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application, and said account still remains unsettled and unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being

given to the head of said department and to the Attorney General of the United States, proceed to hear the parties and to ascertain the amount, if any, due the United States on said account. The Attorney General shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The judgment of said court or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court; and unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred. The provisions of section one hundred and sixty-six shall apply to cases under this section. (36 Stats. 1141; 5 Fed. Stats. Ann., 2d ed., p. 681; 2 U. S. Comp. Stats. 1916, § 1171; Giering v. United States, 26 Ct. Cl. 319.)

§ 181 (Drawn from § 9 of Tucker Act, March 3, 1887, c. 359). The plaintiff or the United States, in any suit brought under the provision of the section last preceding, shall have the same right of appeal as is conferred under sections two hundred and forty-two and two hundred and forty-three; and such right shall be exercised only within the time and in the manner therein prescribed. (36 Stats. 1142; 5 Fed. Stats. Ann., 2d ed., p. 682; 2 U. S. Comp. Stats. 1916, § 1172. In general, Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 **L. Ed.** 117, 1 Sup. Ct. 140.)

§ 182 (Re-enacting § 10 of Act of March 3, 1891, c. 538, 26 Stats. 854). In any case brought in the court of claims under any act of Congress by which that court is authorized to render a judgment or decree against the United States, or against any Indian tribe or any Indians, or against any fund held in trust by the United States for any Indian tribe or for any Indians, the claimant, or the United States, or the tribe of Indians, or other party in interest shall have the same right of appeal as is conferred under sections two hundred and forty-two and two hundred and forty-three; and such right shall be exercised only within the time and in the manner therein prescribed. (36 Stats. 1142; 5 Fed. Stats. Ann., 2d ed., p. 683; 2 U. S. Comp. Stats. 1916, § 1173.)

§ 183 (Re-enacting § 11 of Tucker Act, March 3, 1887, c. 359). The Attorney General shall report to Congress, at the beginning of each

regular session, the suits under section one hundred and eighty, in which a final judgment or decree has been rendered, giving the date of each and a statement of the costs taxed in each case. (36 Stats. 1142; 5 Fed. Stats. Ann., 2d ed., p. 683; 2 U. S. Comp. Stats. 1916, § 1174. In general, Sena v. Amer. Turquoise Co., 220 U. S. 497, 55 L. Ed. 559, 31 Sup. Ct. 488.)

§ 184 (Re-enacting § 4 of Bowman Act of March 3, 1883, c. 116). In any case of a claim for supplies or stores taken by or furnished to any part of the military or naval forces of the United States for their use during the late Civil War, the petition shall aver that the person who furnished such supplies or stores, or from whom such supplies or stores were taken, did not give any aid or comfort to said rebellion, but was throughout that war loyal to the government of the United States, and the fact of such loyalty shall be a jurisdictional fact; and unless the said court shall, on a preliminary inquiry, find that the person who furnished such supplies or stores, or from whom the same were taken as aforesaid, was loyal to the government of the United States throughout said war, the court shall not have jurisdiction of such cause, and the same shall, without further proceedings, be dismissed. (36 Stats. 1142; 5 Fed. Stats. Ann., 2d ed., p. 683; 2 U. S. Comp. Stats. 1916, § 1175; Foster's Federal Practice, 5th ed., p. 2316.)

§ 185 (Drawn from § 5 of the Bowman Act of March 3, 1883, c. 116). The Attorney General, or his assistants under his direction, shall appear for the defense and protection of the interests of the United States in all cases which may be transmitted to the court of claims under the provisions of this chapter, with the same power to interpose counter-claims, offsets, defenses for fraud practiced or attempted to be practiced by claimants, and other defenses, in like manner as he is required to defend the United States in said court. (36 Stats. 1142; 5 Fed. Stats. Ann., 2d ed., p. 684; 2 U. S. Comp. Stats. 1916, § 1176.)

§ 186 (Combining § 1087, Rev. Stats. and § 6 of the Bowman Act of March 3, 1883, c. 116). No person shall be excluded as a witness in the court of claims on account of color, because he or she is a party to or interested in the cause or proceeding; and any plaintiff or party in interest may be examined as a witness on the part of the government. (36 Stats. 1143, as amended by Act of Feb. 15, 1912, c. 28; 37 Stats. 61; 5 Fed. Stats. Ann., 2d ed., p. 685; 2 U. S. Comp. Stats. 1916, § 1177.)

§ 187 (Drawn from § 7 of the Bowman Act of March 3, 1883, c. 116). Reports of the court of claims to Congress, under sections one hundred and forty-eight and one hundred and fifty-one, if not finally acted upon during the session at which they are reported, shall be continued from session to session and from Congress to Congress until the same shall be finally acted upon. (36 Stats. 1143; 5 Fed. Stats. Ann., 2d ed., p. 685; 2 U. S. Comp. Stats. 1916, § 1178.)

CHAPTER EIGHT.

THE COURT OF CUSTOMS APPEALS.

SEC.
188. Court of customs appeals; appointment and salary of judges; quorum; circuit and district judges may act in place of judge disqualified, etc.
189. Court to be always open for business; terms may be held in any circuit; when expenses of judges to be paid.
190. Marshal of the court; appointment, salary, and duties.
191. Clerk of the court; appointment, salary, and duties.
192. Assistant clerk, stenographic clerks, and reporter; appointment, salary, and duties.
193. Rooms for holding court to be provided; bailiffs and messengers.
194. To be a court of record; to prescribe form and style of seal, and establish rules and regulations; may affirm, modify, or reverse and remand case, etc.
SEC.
195. Final decisions of board of general appraisers to be reviewed only by customs court.
196. Other courts deprived of jurisdiction in customs cases; pending cases excepted.
197. Transfer to customs court of pending cases; completion of testimony.
198. Appeals from board of general appraisers; time within which to be taken; record to be transmitted to customs court.
199. Records filed in customs court to be at once placed on calendar; calendar to be called every sixty days.

§ 188 (Drawn from Act Feb. 5, 1910, c. 62, 36 Stats. 214). There shall be a United States court of customs appeals, which shall consist of a presiding judge and four associate judges, each of whom shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive a salary of seven thousand dollars a year. The presiding judge shall be so designated in the order of appointment and in the commission issued to him by the President; and the associate judges shall have precedence according to the date of their commissions. Any three members of said court shall constitute a quorum, and the con-

currence of three members shall be necessary to any decision thereof. In case of a vacancy or of the temporary inability or disqualification, for any reason, of one or two of the judges of said court, the President may, upon the request of the presiding judge of said court, designate any qualified United States circuit or district judge or judges to act in his or their place; and such circuit or district judges shall be duly qualified to so act. (36 Stats. 1143; 5 Fed. Stats. Ann., 2d ed., p. 686; 2 U. S. Comp. Stats. 1916, § 1179; Foster's Federal Practice, 5th ed., p. 2330.)

§ 189 (Drawn from Act Feb. 5, 1910, c. 62, 36 Stats. 214). The said court of customs appeals shall always be open for the transaction of business, and sessions thereof may, in the discretion of the court, be held in the several judicial circuits, and at such places as said court may from time to time designate. Any judge who, in pursuance of the provisions of this chapter, shall attend a session of said court at any place other than the city of Washington, shall be paid, upon his written and itemized certificate, by the marshal of the district in which the court shall be held, his actual and necessary expenses incurred for travel and attendance, and the actual and necessary expenses of one stenographic clerk who may accompany him; and such payments shall be allowed the marshal in the settlement of his accounts with the United States. (36 Stats. 1143; 5 Fed. Stats. Ann., 2d ed., p. 686; 2 U. S. Comp. Stats. 1916, § 1180.)

§ 190 (Drawn from § 28 of the Tariff Act of Aug. 5, 1909, c. 6, 36 Stats. 105). Said court shall have the services of a marshal, with the same duties and powers, under the regulations of the court, as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. Said services within the District of Columbia shall be performed by a marshal to be appointed by and to hold office during the pleasure of the court, who shall receive a salary of three thousand dollars per annum. Said services outside of the District of Columbia shall be performed by the United States marshals in and for the districts where sessions of said court may be held; and to this end said marshals shall be the marshals of said court. The marshal of said court for the District of Columbia, is authorized to purchase, under the direction of the presiding judge, such books, periodicals, and stationery, as may be necessary for the use of said court; and such expenditures shall be allowed and paid by the Secretary of the Treasury upon claim duly made and approved by said presiding judge. (36 Stats. 1144; 5 Fed. Stats. Ann., 2d ed., p. 686; 2 U. S. Comp. Stats. 1916, § 1181.)

§ 191 (Drawn from § 28 of the Tariff Act of Aug. 5, 1909, c. 6, 36 Stats. 105). The court shall appoint a clerk, whose office shall be in the city of Washington, District of Columbia, and who shall perform and exercise the same duties and powers in regard to all matters within the jurisdiction of said court as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the clerk shall be three thousand five hundred dollars per annum, which sum shall be in full payment for all service rendered by such clerk; and all fees of any kind whatever, and all costs, shall be by him turned into the United States Treasury. Said clerk shall not be appointed by the court or any judge thereof as a commissioner, master, receiver, or referee. The costs and fees in the said court shall be fixed and established by said court in a table of fees to be adopted and approved by the Supreme Court of the United States within four months after the organization of said court: *Provided,* That the costs and fees so fixed shall not, with respect to any item, exceed the costs and fees charged in the Supreme Court of the United States; and the same shall be expended, accounted for, and paid over to the Treasury of the United States. (36 Stats. 1144; 5 Fed. Stats. Ann., 2d ed., p. 687; 2 U. S. Comp. Stats. 1916, §§ 1181, 1182.)

§ 192 (Drawn from § 28 of the Tariff Act of Aug. 5, 1909, c. 6, 36 Stats. 105). In addition to the clerk, the court may appoint an assistant clerk at a salary of two thousand dollars per annum, five stenographic clerks at a salary of one thousand six hundred dollars per annum each, one stenographic reporter at a salary of two thousand five hundred dollars per annum, and a messenger at a salary of eight hundred and forty dollars per annum, all payable in equal monthly installments, and all of whom, including the clerk, shall hold office during the pleasure of and perform such duties as are assigned them by the court. Said reporter shall prepare and transmit to the Secretary of the Treasury once a week in time for publication in the Treasury Decisions copies of all decisions rendered to that date by said court, and prepare and transmit, under the direction of said court, at least once a year, reports of said decisions rendered to that date, constituting a volume, which shall be printed by the Treasury Department in such numbers and distributed or sold in such manner as the Secretary of the Treasury shall direct. (36 Stats. 1144; 5 Fed. Stats. Ann., 2d ed., p. 687; 2 U. S. Comp. Stats. 1916, § 1183.)

§ 193 (Drawn from § 8 of the Tariff Act of Aug. 5, 1909, c. 6, 36 Stats. 105). The marshal of said court for the District of Columbia

and the marshals of the several districts in which said court of customs appeals may be held shall, under the direction of the Attorney General, and with his approval, provide such rooms in the public buildings of the United States as may be necessary for said court: *Provided,* That in case proper rooms cannot be provided in such buildings, then the said marshals, with the approval of the Attorney General, may, from time to time, lease such rooms as may be necessary for said court. The bailiffs and messengers of said court shall be allowed the same compensation for their respective services as are allowed for similar services in the existing district courts. In no case shall said marshals secure other rooms than those regularly occupied by existing district courts, or other public officers, except where such cannot, by reason of actual occupancy or use, be occupied or used by said court of customs appeals. (36 Stats. 1144; 5 Fed. Stats. Ann., 2d ed., p. 688; 2 U. S. Comp. Stats. 1916, § 1184.)

§ 194 (Drawn from § 8 of the Tariff Act of Aug. 5, 1909, c. 6, 36 Stats. 105). The said court of customs appeals shall be a court of record, with jurisdiction as in this chapter established and limited. It shall prescribe the form and style of its seal. and the form of its writs and other process and procedure, and exercise such powers conferred by law as may be conformable and necessary to the exercise of its jurisdiction. It shall have power to establish all rules and regulations for the conduct of the business of the court, and as may be needful for the uniformity of decisions within its jurisdiction as conferred by law. It shall have power to review any decision or matter within its jurisdiction, and may affirm, modify, or reverse the same and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly. (36 Stats. 1144; 5 Fed. Stats. Ann., 2d ed., p. 688; 2 U. S. Comp. Stats. 1916, § 1185.)

§ 195 (As Amended Act of Aug. 22, 1914, c. 267). That the Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classifications, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases; *Provided, however,* That in any case in which

the judgment or decree of the Court of Customs Appeals is made final by the provisions of this title, it shall be competent for the Supreme Court, upon the petition of either party, filed within sixty days next after the issue by the Court of Customs Appeals of its mandate upon decision, in any case in which there is drawn in question the construction of the Constitution of the United States, or any part thereof, or of any treaty made pursuant thereto, or in any other case when the Attorney General of the United States shall, before the decision of the Court of Customs Appeals is rendered, file with the court a certificate to the effect that the case is of such importance as to render expedient its review by the Supreme Court, to require by *certiorari* or otherwise, such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court; *And provided further,* That this Act shall not only apply to any case involving only the construction of section one, or any portion thereof, of an Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August fifth, nineteen hundred and nine, nor to any case involving the construction of section two of an Act entitled "An Act to promote reciprocal trade relations with the Dominion of Canada, and for other purposes," approved July twenty-sixth, nineteen hundred and eleven. (36 Stats. 1145; 38 Stats. 703; 5 Fed. Stats. Ann., 2d ed., p. 689; 2 U. S. Comp. Stats. 1916, § 1186.)

§ 196 (Drawn from § 8 of the Tariff Act of Aug. 5, 1909, c. 6, 36 Stats. 105). After the organization of said court, no appeal shall be taken or allowed from any board of United States general appraisers to any other court, and no appellate jurisdiction shall thereafter be exercised or allowed by any other courts in cases decided by said board of United States general appraisers; but all appeals allowed by law from such board of general appraisers shall be subject to review only in the court of customs appeals hereby established, according to the provisions of this chapter: *Provided,* That nothing in this chapter shall be deemed to deprive the Supreme Court of the United States of jurisdiction to hear and determine all customs cases which have heretofore been certified to said court from the United States circuit courts of appeals on applications for writs of *certiorari* or otherwise, nor to review by writ of *certiorari* any customs case heretofore decided or now pending and hereafter decided by any circuit court of appeals, provided application for said writ be made within six months after August fifth, nineteen hundred and nine: *Provided, further,* That all customs cases decided by

a circuit or district court of the United States or a court of a territory of the United States prior to said date above mentioned, and which have not been removed from said courts by appeal or writ of error, and all such cases theretofore submitted for decision in said courts and remaining undecided may be reviewed on appeal at the instance of either party by the United States court of customs appeals, provided such appeal be taken within one year from the date of the entry of the order, judgment, or decrees sought to be reviewed. (36 Stats. 1145; 5 Fed. Stats. Ann., 2d ed., p. 690; 2 U. S. Comp. Stats. 1916, § 1187.)

§ 197 (Drawn from § 28 of the Tariff Act of Aug. 5, 1909, c. 6, 36 Stats. 105). Immediately upon the organization of the court of customs appeals, all cases within the jurisdiction of that court pending and not submitted for decision in any of the United States circuit courts of appeals, United States circuit, territorial or district courts, shall, with the record and samples therein, be certified by said courts to said court of customs appeals for further proceedings in accordance herewith: *Provided,* That where orders for the taking of further testimony before a referee have been made in any of such cases, the taking of such testimony shall be completed before such certification. (36 Stats. 1145; 5 Fed. Stats. Ann., 2d ed., p. 691; 2 U. S. Comp. Stats. 1916, § 1188.)

§ 198 (Drawn from § 28 of the Tariff Act of Aug. 5, 1909, c. 6, 36 Stats. 105). If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the board of general appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the court of customs appeals for a review of the questions of law and fact involved in such decision: *Provided,* That in Alaska and in the insular and other outside possessions of the United States ninety days shall be allowed for making such application to the court of customs appeals. Such application shall be made by filing in the office of the clerk of said court a concise statement of errors of law and fact complained of; and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall immediately order the board of general appraisers to transmit to said court the record and evidence taken by them, together with the certified statement of the facts involved in the case and their decision thereon; and all the evidence taken by and

before said board shall be competent evidence before said court of customs appeals. The decision of said court of customs appeals shall be final, and such cause shall be remanded to said board of general appraisers for further proceedings to be taken in pursuance of such determination. (36 Stats. 1146; 5 Fed. Stats. Ann., 2d ed., p. 691; 2 U. S. Comp. Stats. 1916, § 1189; Foster's Federal Practice, 5th ed., p. 2458.)

§ 199 (Drawn from § 28 of the Tariff Act of Aug. 5, 1909, c. 6, 36 Stats. 105). Immediately upon receipt of any record transmitted to said court for determination the clerk thereof shall place the same upon the calendar for hearing and submission; and such calendar shall be called and all cases thereupon submitted, except for good cause shown, at least once every sixty days: *Provided,* That such calendar need not be called during the months of July and August of any year. (36 Stats. 1146; 5 Fed. Stats. Ann., 2d ed., p. 698; 2 U. S. Comp. Stats. 1916, § 1190.)

CHAPTER NINE.

THE COMMERCE COURT.

The commerce court was abolished by the deficiency appropriation act of October 22, 1913, c. 32, 38 Stats. 219, 221. The jurisdiction of this court was transferred to the various district courts. The chapter is retained in our Appendix for an understanding of the jurisdiction so transferred. The portion of the deficiency bill abolishing the commerce court is as follows:

The commerce court, created and established by the act entitled "An Act to Create a Commerce Court and to Amend the Act Entitled 'An Act to Regulate Commerce,' Approved February Fourth, Eighteen Hundred and Eighty-Seven, as Heretofore Amended, and for Other Purposes," approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said commerce court by said act is transferred to and vested in the several district courts of the United States, and all acts or parts of acts in so far as they relate to the establishment of the commerce court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said act, but such judges shall continue to act under assignment, as in the said act provided, as judges of the district courts and circuit courts of appeals; and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed. (5 Fed. Stats. Ann., 2d ed., p. 1108; 1 U. S. Comp. Stats. 1916, § 992, p. 831.)

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment. (5 Fed. Stats. Ann., 2d ed., p. 1108.)

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this act shall be the same as that heretofore prevailing in the commerce court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the commerce court. (5 Fed. Stats. Ann., 2d ed., p. 1108.)

No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided,* That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the

date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. (5 Fed. Stats. Ann., 2d ed., p. 1112.)

An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case, if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the Attorney General of the state. (5 Fed. Stats. Ann., 2d ed., p. 1113.)

All cases pending in the commerce court at the date of the passage of this act shall be deemed pending in and be transferred forthwith to said district courts except cases which may previously have been submitted to that court for final decree, and the latter to be transferred to the district courts if not decided by the commerce court before December first, nineteen hundred and thirteen, and all cases wherein injunctions or other orders or decrees, mandatory or otherwise, have been directed or entered prior to the abolition of the said court shall be transferred forthwith to said district courts, which shall have jurisdiction to proceed therewith and to enforce said injunctions, orders, or decrees. Each of said cases and all the records, papers, and proceedings shall be transferred to the district court wherein it might have been filed at the time it was filed in the commerce court if this act had then been in effect; and if it might have been filed in any one of two or more district courts it shall be transferred to that one of said district courts which may be designated by the petitioner or petitioners in said case, or, upon failure

of said petitioners to act in the premises within thirty days after the passage of this act, to such one of said district courts as may be designated by the judges of the commerce court. The judges of the commerce court shall have authority, and are hereby directed, to make any and all orders and to take any other action necessary to transfer as aforesaid the cases and all the records, papers, and proceedings then pending in the commerce court to said district courts. All administrative books, dockets, files, and all papers of the commerce court not transferred as part of the record of any particular case shall be lodged in the Department of Justice. All furniture, carpets, and other property of the commerce court is turned over to the Department of Justice, and the Attorney General is authorized to supply such portion thereof as in his judgment may be proper and necessary to the United States board of mediation and conciliation.

Any case hereafter remanded from the Supreme Court which, but for the passage of this act, would have been remanded to the commerce court, shall be remanded to a district court, designated by the Supreme Court, wherein it might have been instituted at the time it was instituted in the commerce court if this act had then been in effect, and thereafter such district court shall take all necessary and proper proceedings in such case in accordance with law and such mandate, order, or decree therein as may be made by said Supreme Court. (5 Fed. Stats. Ann., 2d ed., p. 1116.)

All laws or parts of laws inconsistent with the foregoing provisions relating to the commerce court, are repealed. (5 Fed. Stats. Ann., 2d ed., p. 1117.)

SEC.
200. Commerce court created; judges of, appointment and designation; expense allowance to judges.
201. Additional circuit judges; appointment and assignment.
202. Officers of the court; clerk, marshal, etc.; salaries, etc.
203. Court to be always open for business; sessions of, to be held in Washington and elsewhere.
204. Marshals to provide rooms for holding court outside of Washington.
205. Assignment of judges to other duty; vacancies, how filled.
206. Powers of court and judges; writs, process, procedure, etc.
207. Jurisdiction of the court.
208. Suits to enjoin, etc., orders of Interstate Commerce Commissions to be against United States; restraining orders, when granted without notice.
209. Jurisdiction of the court, how invoked; practice and procedure.
210. Final judgments and decrees reviewable in Supreme Court.
211. Suits to be against United States; when United States may intervene.
212. Attorney General to control all cases; Interstate Commerce Commission may appear as of right; parties interested may intervene, etc.
213. Complainants may appear and be made parties to case.
214. Pending cases to be transferred to commerce court; exception; status of transferred cases.

§ 200 (Re-enacting part of Act of June 18, 1910, c. 309, 36 Stats. 539). There shall be a court of the United States, to be known as the commerce court, which shall be a court of record, and shall have a seal of such form and style as the court may prescribe. The said court shall be composed of five judges, to be from time to time designated and assigned thereto by the Chief Justice of the United States, from among the circuit judges of the United States, for the period of five years, except that in the first instance the court shall be composed of the five additional circuit judges referred to in the next succeeding section, who shall be designated by the President to serve for one, two, three, four, and five years, respectively, in order that the period of designation of one of the said judges shall expire in each year thereafter. In case of the death, resignation, or termination of assignment of any judge so designated, the Chief Justice shall designate a circuit judge to fill the vacancy so caused and to serve during the unexpired period for which the original designation was made. After the year nineteen hundred and fourteen no circuit judge shall be redesignated to serve in the commerce court until the expiration of at least one year after the expiration of the period of his last previous designation. The judge first designated for the five year period shall be presiding judge of said court, and thereafter the judge senior in designation shall be the presiding judge. The associate judges shall have precedence and shall succeed to the place and powers of the presiding judge whenever he may be absent or incapable of acting in the order of the date of their designations. Four of said judges shall constitute a quorum, and at least a majority of the court shall concur in all decisions. Each of the judges during the period of his service in the commerce court shall, on account of the regular sessions of the court being held in the city of Washington, receive in addition to his salary as circuit judge an expense allowance at the rate of one thousand five hundred dollars per annum. (36 Stats. 1146; 5 Fed. Stats. Ann., 2d ed., p. 698. Superseded.)

§ 201 (Re-enacting part of Act of June 18, 1910, 36 Stats. 539). The five additional circuit judges authorized by the act to create a commerce court, and for other purposes, approved June eighteenth, nineteen hundred and ten, shall hold office during good behavior, and from time to time shall be designated and assigned by the Chief Justice of the United States for service in the district court of any district, or the circuit court of appeals for any circuit, or in the commerce court, and when so designated and assigned for service in a district court or circuit court of appeals shall have the powers and jurisdiction in this act conferred upon a circuit judge in his circuit. (36 Stats. 1146; 5 Fed. Stats. Ann., 2d ed., p. 699. Partly preserved.)

§ 202 (Re-enacting part of Act of June 18, 1910, 36 Stats. 539). The court shall also have a clerk and a marshal, with the same duties and powers, so far as they may be appropriate and are not altered by rule of the court, as are now possessed by the clerk and marshal, respectively, of the Supreme Court of the United States. The offices of the clerk and marshal of the court shall be in the city of Washington, in the District of Columbia. The judges of the court shall appoint the clerk and marshal, and may also appoint, if they find it necessary, a deputy clerk and deputy marshal; and such clerk, marshal, deputy clerk, and deputy marshal, shall hold office during the pleasure of the court. The salary of the clerk shall be four thousand dollars per annum; the salary of the marshal three thousand dollars per annum; the salary of the deputy clerk two thousand five hundred dollars per annum; and the salary of the deputy marshal two thousand five hundred dollars per annum. The clerk and marshal may, with the approval of the court, employ all requisite assistance. The costs and fees in said court shall be established by the court in a table thereof, approved by the Supreme Court of the United States, within four months after the organization of the court; but such costs and fees shall in no case exceed those charged in the Supreme Court of the United States, and shall be accounted for and paid into the Treasury of the United States. (36 Stats. 1147.)

§ 203 (Re-enacting part of Act of June 18, 1910, 36 Stats. 539). The commerce court shall always be open for the transaction of business. Its regular sessions shall be held in the city of Washington, in the District of Columbia; but the powers of the court or of any judge thereof, or of the clerk, marshal, deputy clerk, or deputy marshal, may be exercised anywhere in the United States; and for expedition of the work of the court and the avoidance of undue expense or inconvenience to suitors the court shall hold sessions in different parts of the United States as may be found desirable. The actual and necessary expenses of the judges, clerk, marshal, deputy clerk, and deputy marshal of the court incurred for travel and attendance elsewhere than in the city of Washington, shall be paid upon the written and itemized certificate of such judge, clerk, marshal, deputy clerk, or deputy marshal, by the marshal of the court, and shall be allowed to him in the settlement of his accounts with the United States. (36 Stats. 1148.)

§ 204 (Re-enacting part of Act of June 18, 1910, 36 Stats. 539). The United States marshals of the several districts outside of the city of Washington in which the commerce court may hold its sessions shall provide, under the direction and with the approval of the Attorney General, such rooms in the public buildings of the United States as may be necessary

for the court's use; but in case proper rooms cannot be provided in such public buildings, said marshals, with the approval of the Attorney General, may then lease from time to time other necessary rooms for the court. (36 Stats. 1148.)

§ 205 (Re-enacting part of Act of June 18, 1910, 36 Stats. 539). If, at any time, the business of the commerce court does not require the services of all the judges, the Chief Justice of the United States may, by writing, signed by him and filed in the Department of Justice, terminate the assignment of any of the judges, or temporarily assign him for service in any district court or circuit court of appeals. In cases of illness or other disability of any judge assigned to the commerce court the Chief Justice of the United States may assign any other circuit judge of the United States to act in his place, and may terminate such assignment when the exigency therefor shall cease; and any circuit judge so assigned to act in place of such judge shall, during his assignment, exercise all the powers and perform all the functions of such judge. (36 Stats. 1148.)

§ 206 (Re-enacting part of Act of June 18, 1910, 36 Stats. 539). In all cases within its jurisdiction the commerce court, and each of the judges assigned thereto, shall, respectively, have and may exercise any and all of the powers of a district court of the United States and of the judges of said court, respectively, so far as the same may be appropriate to the effective exercise of the jurisdiction hereby conferred. The commerce court may issue all writs and process appropriate to the full exercise of its jurisdiction and powers and may prescribe the form thereof. It may also, from time to time, establish such rules and regulations concerning pleading, practice, or procedure in cases or matters within its jurisdiction as to the court shall seem wise and proper. Its orders, writs, and processes may run, be served, and be returnable anywhere in the United States; and the marshal and deputy marshal of said court and also the United States marshals and deputy marshals in the several districts of the United States shall have like powers and be under like duties to act for and in behalf of said court as pertain to United States marshals and deputy marshals generally when acting under like conditions concerning suits or matters in the district courts of the United States. (36 Stats. 1148; 5 Fed. Stats. Ann., 2d ed., p. 700.)

§ 207 (Re-enacting part of Act of June 18, 1910, 36 Stats. 539). The commerce court shall have the jurisdiction possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Third. Such cases as by section three of the act entitled "An Act to Further Regulate Commerce with Foreign Nations and Among the States," approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

Fourth. All such *mandamus* proceedings as under the provisions of section twenty or section twenty-three of the act entitled "An Act to Regulate Commerce," approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

Nothing contained in this chapter shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the commerce court.

The jurisdiction of the commerce court over cases of the foregoing classes shall be exclusive; but this chapter shall not affect the jurisdiction possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes. (36 Stats. 1148; 5 Fed. Stats. Ann., 2d ed., p. 1105. Construction, Proctor & Gamble Co. v. United States, 188 Fed. 221. Jurisdiction, Proctor & Gamble v. United States, 225 U. S. 282, 56 **L. Ed.** 1091, 32 Sup. Ct. 761. Misconception of extent of powers by Commission, Interstate Comm. v. Clyde Steamship Co., 181 U. S. 29, 45 **L. Ed.** 729, 21 Sup. Ct. 512. Directing common carriers, Southern Pac. v. Interstate Com. Com., 200 U. S. 536, 50 **L. Ed.** 594, 26 Sup. Ct. 330. Enforcing order of Commission, Farmers' Loan & Trust Co. v. Northern Pac. Ry. Co., 83 Fed. 249. Power of a court of equity, Re Central Stock Yards Co. v. Louisville & N. R. Co., 112 Fed. 823. Commerce Commission, an administrative body, Western N. Y. & P. R. Co. v. Penn. Refining Co., 137 Fed. 343, 70 C. C. A. 23. General powers, Chicago, R. I. & P. Ry. Co. v. Interstate Com. Com., 171 Fed. 680.)

§ 208 (Re-enacting part Act June 18, 1910, 36 Stats. 542). Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the commerce court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the

commerce court, in its discretion, may restrain or suspend, in whole or in part, the operation of the Commission's order pending the final hearing and determination of the suit. No order or injunction so restraining or suspending an order of the Interstate Commerce Commission shall be made by the commerce court otherwise than upon notice and after hearing, except that in cases where irreparable damage would otherwise ensue to the petitioner, said court, or a judge thereof may, on hearing after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of such court or judge, pending application to the court for its order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judge making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until its decision upon the application. (36 Stats. 1149; 5 Fed. Stats. Ann., 2d ed., p. 1110.)

§ 209 (Re-enacting part of Act of June 18, 1910, 36 Stats. 539). The jurisdiction of the commerce court shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the commerce court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office, and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence

in cases pending in said court; and may prescribe that the evidence be taken before a single judge of the court, with power to rule upon the admission of evidence. Except as may be otherwise provided in this chapter, or by rule of the court, the practice and procedure in the commerce court shall conform as nearly as may be to that in like cases in a district court of the United States. (36 Stats. 1149; 5 Fed. Stats. Ann., 2d ed., 1109. A motion to dismiss the petition can be made under this section. Proctor & Gamble Co. v. United States, 118 Fed. 221; Southern Pac. Co. v. Interstate Commerce Commission, 188 Fed. 241.)

§ 210 (Re-enacting part of Act of June 18, 1910, 36 Stats. 539–542). A final judgment or decree of the commerce court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a district court of the United States to the Supreme Court, and the commerce court may direct the original record to be transmitted on appeal instead of a transcript thereof. The Supreme Court may affirm, reverse, or modify the final judgment or decree of the commerce court as the case may require. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the commerce court appealed from, unless the Supreme Court or a justice thereof shall so direct; and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the commerce court granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree. Appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court. (36 Stats. 1150; 5 Fed. Stats. Ann., p. 1114. In general, United States v. Balt. & Ohio R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 Sup. Ct. 817.)

§ 211 (Re-enacting part of Act of June 18, 1910, 36 Stats. 539, 542). All cases and proceedings in the commerce court which but for this chapter would be brought by or against the Interstate Commerce Commission, shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the commerce court whenever, though it has not been made a party, public interests are involved. (36 Stats. 1150; 5 Fed. Stats. Ann., p. 1109.)

§ 212 (Re-enacting part Act June 18, 1910; 36 Stats. 539). The Attorney General shall have charge and control of the interests of the government in all cases and proceedings in the commerce court, and in the Supreme Court of the United States upon appeal from the commerce court. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided,* That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as to right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits: *Provided, further,* That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of this chapter, or the acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein. (36 Stats. 1150; 5 Fed. Stats. Ann., 2d ed., p. 1114.)

§ 213 (Re-enacting part Act June 18, 1910; 36 Stats. 539, 543). Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States. (36 Stats. 1151; 5 Fed. Stats. Ann., 2d ed., p. 1115.)

§ 214 (Re-enacting part Act June 18, 1910; 36 Stats. 539, 543). Until the opening of the commerce court, all cases and proceedings of which from that time the commerce court is hereby given exclusive jurisdiction may be brought in the same courts and conducted in like manner and with like effect as is now provided by law; and if any such case or proceeding shall have gone to final judgment or decree before the opening of the commerce court, appeal may be taken from such final judgment or decree in like manner and with like effect as is now provided by law. Any such case or proceeding within the jurisdiction of the commerce court which may have been begun in any other court as hereby allowed, before the said date, shall be forthwith transferred to the commerce court, if it has not yet proceeded to final judgment or decree in such other court unless it has been finally submitted for the decision of such court, in which case the cause shall proceed in such court to final judgment or decree and further proceeding thereafter, and appeal may be taken direct to the Supreme Court; and if remanded, such cause may be sent back to the court from which the appeal was taken or to the commerce court for further proceeding as the Supreme Court shall direct. All previous proceedings in such transferred case shall stand and operate notwithstanding the transfer, subject to the same control over them by the commerce court and to the same right of subsequent action in the case or proceeding as if the transferred case or proceeding had been originally begun in the commerce court. The clerk of the court from which any case or proceeding is so transferred to the commerce court shall transmit to and file in the commerce court the originals of all papers filed in such case or proceeding and a certified transcript of all record entries in the case or proceeding up to the time of transfer. (36 Stats. 1151. See Hooker v. Interstate Commerce Commission, 188 Fed. 242.)

CHAPTER TEN.

THE SUPREME COURT.

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252. Appellate jurisdiction under the bankruptcy act.
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§ 215 (Re-enacting § 673, Rev. Stats.). The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum. (36 Stats. 1152; 5 Fed. Stats. Ann., 2d ed., p. 701; 2 U. S. Comp. Stats. 1916, § 1191; Foster's Federal Practice, 5th ed., p. 300.)

§ 216 (Re-enacting § 674, Rev. Stats.). The associate justices shall have precedence according to the dates of their commissions, or, when the commissions of two or more of them bear the same date, according to their ages. (36 Stats. 1152; 5 Fed. Stats. Ann., 2d ed., p. 702; 2 U. S. Comp. Stats. 1916, § 1192.)

§ 217 (Re-enacting § 675, Rev. Stats.). In case of a vacancy in the office of Chief Justice, or of his inability to perform the duties and powers of his office, they shall devolve upon the associate justice who is first in precedence, until such disability is removed, or another Chief Justice is appointed and duly qualified. This provision shall apply to every associate justice who succeeds to the office of Chief Justice. (36 Stats. 1152; 5 Fed. Stats. Ann., 2d ed., p. 702; 2 U. S. Comp. Stats. 1916, § 1194.)

§ 218 (Re-enacting § 676, Rev. Stats.). The Chief Justice of the Supreme Court of the United States shall receive the sum of fifteen thousand dollars a year, and the justices thereof shall receive the sum of fourteen thousand five hundred dollars a year each, to be paid monthly. (36 Stats. 1152; 5 Fed. Stats. Ann., 2d ed., p. 702; 2 U. S. Comp. Stats, 1916, § 1194.)

§ 219 (Re-enacting § 677, Rev. Stats.). The Supreme Court shall have power to appoint a clerk and a marshal for said court, and a reporter of its decisions. (36 Stats. 1152; 5 Fed. Stats. Ann., 2d ed., p. 702; 2 U. S. Comp. Stats. 1916, § 1195.)

§ 220 (Drawn from Act of Feb. 22, 1875, c. 95). The clerk of the Supreme Court shall, before he enters upon the execution of his office, give bond, with sufficient sureties, to be approved by the court, to the United States, in the sum of not less than five thousand and not more than twenty thousand dollars, to be determined and regulated by the Attorney General, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court. The Supreme Court may at any time, upon the motion of the Attorney General, to be made upon thirty days' notice, require a new bond, or a bond for an increased amount within the limits above prescribed; and the failure of the clerk to execute the same shall vacate his office. All bonds given by the clerk shall, after approval, be recorded in his office, and copies thereof from the records, certified by the clerk under seal of the court, shall be competent evidence in any court. The original bonds shall be filed in the Department of Justice. (36 Stats. 1152; 5 Fed. Stats. Ann., 2d ed., p. 702; 2 U. S. Comp. Stats. 1916,

§ 1196. Bond of Clerk, Howard v. U. S., 184 U. S. 676, 46 L. Ed. 754, 22 Sup. Ct. 543.)

§ 221 (Re-enacting § 678, Rev. Stats.). One or more deputies of the clerk of the Supreme Court may be appointed by the court on the application of the clerk, and may be removed at the pleasure of the court. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk in his name until a clerk is appointed and qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk, and his estate, and the sureties on his official bond, shall be liable; and his executor or administrator shall have such remedy for any such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime. (36 Stats. 1153; 5 Fed. Stats. Ann., 2d ed., p. 703; 2 U. S. Comp. Stats. 1916, § 1197.)

§ 222 (Re-enacting § 679, Rev. Stats.). The records and proceedings of the court of appeals, appointed previous to the adoption of the present Constitution, shall be kept in the office of the clerk of the Supreme Court, who shall give copies thereof to any person requiring and paying for them, in the manner provided by law for giving copies of the records and proceedings of the Supreme Court; and such copies shall have like faith and credit with all other proceedings of said court. (36 Stats. 1153.)

§ 223 (Re-enacting part Act March 3, 1883, c. 143, 22 Stats. 631). The Supreme Court is authorized and empowered to prepare the tables of fees to be charged by the clerk thereof. (36 Stats. 1153.)

§ 224 (Re-enacting § 680, Rev. Stats.). The marshal is entitled to receive a salary at the rate of four thousand five hundred dollars a year. He shall attend the court at its sessions; shall serve and execute all process and orders issuing from it, or made by the Chief Justice or an associate justice in pursuance of law; and shall take charge of all property of the United States used by the court or its members. With the approval of the Chief Justice he may appoint assistants and messengers to attend the court, with the compensation allowed to officers of the House of Representatives of similar grade. (36 Stats. 1153; 5 Fed. Stats. Ann., 2d ed., p. 605; 2 U. S. Comp. Stats. 1916, § 1200.)

§ 225 (Re-enacting § 681, Rev. Stats.). The reporter shall cause the decisions of the Supreme Court to be printed and published within eight months after they are made; and within the same time he shall deliver

three hundred copies of the volumes of said reports to the Attorney General. The reporter shall, in any year when he is so directed by the court, cause to be printed and published a second volume of said decisions, of which he shall deliver a like number of copies in like manner and time. (36 Stats. 1153.)

§ 226 (Drawn from § 862, Rev. Stats.). The reporter shall be entitled to receive from the Treasury an annual salary of four thousand five hundred dollars when his report of said decisions constitutes one volume and an additional sum of one thousand two hundred dollars when, by direction of the court, he causes to be printed and published in any year a second volume; and said reporter shall be annually entitled to clerk hire in the sum of one thousand two hundred dollars, and to office rent, stationery, and contingent expenses in the sum of six hundred dollars; *Provided,* That the volumes of the decisions of the court heretofore published shall be furnished by the reporter to the public at a sum not exceeding two dollars per volume, and those hereafter published at a sum not exceeding one dollar and seventy-five cents per volume; and the number of volumes now required to be delivered to the Attorney General shall be furnished by the reporter without any charge therefor. Said salary and compensation, respectively, shall be paid only when he causes such decisions to be printed, published, and delivered within the time and in the manner prescribed by law, and upon the condition that the volumes of said reports shall be sold by him to the public for a price not exceeding one dollar and seventy-five cents a volume. (36 Stats. 1153.)

§ 227 (Drawn from § 683, Rev. Stats., as amended Act Feb. 12, 1889, c. 135). The Attorney General shall distribute copies of the Supreme Court reports, as follows: To the President, the justices of the Supreme Court, the judges of the commerce court, the judges of the court of customs appeals, the judges of the circuit courts of appeals, the judges of the district courts, the judges of the court of claims, the judges of the court of appeals and of the supreme court of the District of Columbia, the judges of the several territorial courts, the Secretary of State, the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Postmaster General, the Attorney General, the Secretary of Agriculture, the Secretary of Commerce and Labor, the Solicitor General, the Assistant to the Attorney General, each Assistant Attorney General, each United States district attorney, each Assistant Secretary of each Executive Department, the Assistant Postmasters General, the Secretary of the Senate for the use of the

Senate, the Clerk of the House of Representatives for the use of the House of Representatives, the governors of the territories, the Solicitor for the Department of State, the Treasurer of the United States, the Solicitor of the Treasury, the Register of the Treasury, the Comptroller of the Treasury, the Comptroller of the Currency, the Commissioner of Internal Revenue, the Director of the Mint, each of the six Auditors in the Treasury Department, the Judge Advocate General, War Department, the Paymaster General, War Department, the Judge Advocate General, Navy Department, the Commissioner of Indian Affairs, the Commissioner of Pensions, the Commissioner of the General Land Office, the Commissioner of Patents, the Commissioner of Education, the Commissioner of Labor, the Commissioner of Navigation, the Commissioner of Corporations, the Commissioner General of Immigration, the Chief of the Bureau of Manufactures, the Director of the Geological Survey, the Director of the Census, the Forester, Department of Agriculture, the Purchasing Agent, Postoffice Department, the Interstate Commerce Commission, the Clerk of the Supreme Court of the United States, the Marshal of the Supreme Court of the United States, the Attorney for the District of Columbia, the Naval Academy at Annapolis, the Military Academy at West Point, and the heads of such other executive offices as may be provided by law, of equal grade with any of said offices, each one copy; to the Law Library of the Supreme Court, twenty-five copies; to the Law Library of the Department of the Interior, two copies; to the Law Library of the Department of Justice, two copies; to the Secretary of the Senate for the use of the committees of the Senate, twenty-five copies; to the Clerk of the House of Representatives for the use of the committees of the House, thirty copies; to the Marshal of the Supreme Court of the United States, as custodian of the public property used by the court, for the use of the justices thereof in the conference room, robing room, and court room, three copies; to the Secretary of War for the use of the proper courts and officers of the Philippine Islands and for the headquarters of military departments in the United States, twelve copies; and to each of the places where district courts of the United States are now holden, including Hawaii, and Porto Rico, one copy. He shall also distribute one complete set of said reports, and one set of the digests thereof, to such executive officers as are entitled to receive said reports under this section and have not already received them, to each United States judge and to each United States district attorney who has not received a set, to each of the places where district courts are now held to which said reports have not been distributed, and to each of the places at which a district court may hereafter be held, the edition of said reports and digests to

be selected by the judge or officer receiving them. No distribution of reports and digests under this section shall be made to any place where the court is held in a building not owned by the United States, unless there be at such place a United States officer to whose responsible custody they can be committed. The clerks of said courts (except the Supreme Court) shall in all cases keep said reports and digest for the use of the courts and of the officers thereof. Such reports and digest[s] shall remain the property of the United States, and shall be preserved by the officers above named, and by them turned over to their successors in office. (36 Stats. 1154.)

§ 228 (Drawn from Act July, 1, 1902, 32 Stats. 631). The publishers of the decisions of the Supreme Court shall deliver to the Attorney General, in addition to the three hundred copies delivered by the reporter, such number of copies of each report heretofore published, as the Attorney General may require, for which he shall pay not more than two dollars per volume, and such number of copies of each report hereafter published as he may require, for which he shall pay not more than one dollar and seventy-five cents per volume. The Attorney General shall include in his annual estimates submitted to Congress, an estimate for the current volumes of such reports, and also for the additional sets of reports and digests required for distribution under the section last preceding. (36 Stats. 1155.)

§ 229. (New.) The Attorney General is authorized to procure complete sets of the Federal Reporter or, in his discretion, other publication containing the decisions of the circuit courts of appeals, circuit courts, and district courts, and digests thereof, and also future volumes of the same as issued, and distribute a copy of each such reports and digests to each place where a circuit court of appeals, or a district court, is now or may hereafter regularly be held, and to the Supreme Court of the United States, the court of claims, the court of customs appeals, the commerce court, the court of appeals and the supreme court of the District of Columbia, the Attorney General, the Solicitor General, the Solicitor of the Treasury, the Assistant Attorney General for the Department of the Interior, the Commissioner of Patents, and the Interstate Commerce Commission; and to the Secretary of the Senate, for the use of the Senate, and to the Clerk of the House of Representatives, for the use of the House of Representatives, not more than three sets each. Whenever any such court room, office, or officer shall have a partial or complete set of any such reports, or digests, already purchased or owned by the United States, the Attorney General shall dis-

tribute to such court room, office, or officer, only sufficient volumes to make a complete set thereof. No distribution of reports or digests under this section shall be made to any place where the court is held in a building not owned by the United States, unless there be at such place a United States officer to whose responsible custody they can be committed. The clerks of the courts (except the Supreme Court) to which the reports and digests are distributed under this section, shall keep such reports and digests for the use of the courts and the officers thereof. All reports and digests distributed under the provisions of this section shall be and remain the property of the United States and, before distribution, shall be plainly marked on their covers with the words "The Property of the United States," and shall be transmitted by the officers receiving them to their successors in office. Not to exceed two dollars per volume shall be paid for the back and current volumes of the Federal Reporter or other publication purchased under the provisions of this section, and not to exceed five dollars per volume for the digest, the said money to be disbursed under the direction of the Attorney General; and the Attorney General shall include in his annual estimates submitted to Congress, an estimate for the back and current volumes of such reports and digests, the distribution of which is provided for in this section. (36 Stats. 1155.)

§ 230 (As Amended Act Sept. 6, 1916, c. 448, § 1. Re-enacting § 684, Rev. Stats.). The Supreme Court shall hold at the seat of government, one term annually, commencing on the first Monday in October, and such adjourned or special term as it may find necessary for the dispatch of business. (39 Stats. 726; 5 Fed. Stats. Ann., 2d ed., p. 708; 2 U. S. Comp. Stats. 1916, § 1207; Foster's Federal Practice, 5th ed., p. 8.)

§ 231 (Re-enacting § 685, Rev. Stats.). If, at any session of the Supreme Court, a quorum does not attend on the day appointed for holding it, the justices who do attend may adjourn the court from day to day for twenty days after said appointed time, unless there be sooner a quorum. If a quorum does not attend within said twenty days the business of the court shall be continued over till the next appointed session; and if, during a term, after a quorum has assembled, less than that number attend on any day, the justices attending may adjourn the court from day to day until there is a quorum, or may adjourn without day. (36 Stats. 1156; 5 Fed. Stats. Ann., 2d ed., p. 708; 2 U. S. Comp. Stats. 1916, § 1208.)

§ 232 (Re-enacting § 686, Rev. Stats.). The justices attending at any term, when less than a quorum is present, may, within the twenty days

mentioned in the preceding section, make all necessary orders touching any suit, proceeding, or process, depending in or returned to the court, preparatory to the hearing, trial, or decision thereof. (36 Stats. 1156; 5 Fed. Stats. Ann., 2d ed., p. 708; 2 U. S. Comp. Stats. 1916, § 1209.)

§ 233 (Re-enacting § 687, Rev. Stats.). The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party. (36 Stats. 1156; 5 Fed. Stats. Ann., 2d ed., p. 708; 2 U. S. Comp. Stats. 1916, § 1210; Simkins' Federal Equity Suit, 3d ed., p. 41.)

§ 234 (Re-enacting § 688, Rev. Stats.). The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a state, or an ambassador, or other public minister, or a consul, or vice consul is a party. (36 Stats. 1156; 5 Fed. Stats. Ann., 2d ed., p. 717; 2 U. S. Comp. Stats. 1916, § 1211; Foster's Federal Practice, 5th ed., p. 1437; Simkins' Federal Equity Suit, 3d ed., p. 41.)

§ 235 (Re-enacting § 689, Rev. Stats.). The trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. (36 Stats. 1156; 5 Fed. Stats. Ann., 2d ed., p. 722; 2 U. S. Comp. Stats. 1916, § 1212. In general, Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. Ed. 873, 19 Sup. Ct. 580.)

§ 236 (Re-enacting § 690, Rev. Stats.). The Supreme Court shall have appellate jurisdiction in the cases hereinafter specially provided for. (36 Stats. 1156.)

§ 237 (As Amended Act Sept. 6, 1916, c. 448, § 2.). A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a

treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a *writ of error*. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgments or decree of such state court, and may in its discretion, award execution or remand the same to the court from which it was removed by the writ.

Added by Act Dec. 23, 1914, c. 2. "It shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court, although the decision in such case may have been in favor of the validity of the treaty or statute or authority exercised under the United States or may have been against the validity of the State Statute or authority claimed to be repugnant to the Constitution, treaties, or laws of the United States, or in favor of the title, right, privilege, or immunity claimed under the Constitution, treaty, statute, commission, or authority of the United States. (38 Stats. 790, 39 Stats. 726.)

§ 238 (As amended Act Jan. 28, 1915, c. 22, 38 Stats. 803). Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii, and the United States District Court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question; and in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States.

§ 239. In any case within its appellate jurisdiction, as defined in section one hundred and twenty-eight, the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal. (36 Stats. 1157; 5 Fed. Stats. Ann., 2d ed., p. 838; 2 U. S. Comp. Stats. 1916, § 1216; Foster's Federal Practice, 5th ed., p. 2378; Simkins' Federal Equity Suit, 3d ed., pp. 735, 737.)

§ 240. In any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court. (36 Stats. 1157; 5 Fed. Stats. Ann., 2d ed., p. 854; 2 U. S. Comp. Stats. 1916, § 1217; Foster's Federal Practice, 5th ed., pp. 1471, 2378.)

§ 241 (Drawn from § 6, Act Mch. 3, 1891, c. 517). In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs. (36 Stats. 1157; 5 Fed. Stats. Ann., 2d ed., p. 877; 2 U. S. Comp. Stats. 1916, § 1218; Foster's Federal Practice, 5th ed., p. 2374; Simkins' Federal Equity Suit, 3d ed., p. 741.)

§ 242 (Re-enacting § 707, Rev. Stats.). An appeal to the Supreme Court shall be allowed on behalf of the United States, from all judgments of the court of claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court as provided in section one hundred and seventy-two. (36 Stats. 1157; 5 Fed. Stats. Ann., 2d ed., p. 887; 2 U. S. Comp. Stats. 1916, § 1219; Foster's Federal Practice, 5th ed., pp. 2353, 2385, 2438.)

§ 243 (Re-enacting § 708, Rev. Stats.). All appeals from the court of claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct. (36 Stats. 1157; 5 Fed. Stats. Ann., 2d ed., p. 890; 2 U. S. Comp. Stats. 1916, § 1220; Foster's Federal Practice, 5th ed., pp. 2355, 2457.)

§ 244 (Drawn from § 35 of the Organic Act of Porto Rico, of April 12, 1906, c. 191; 31 Stats. 77. Repealed Act Jan. 28, 1915, c. 22, § 3; 38 Stats. 804). Writs of error and appeals from the final judgments and decrees of the Supreme Court of, and the United States district court for, Porto Rico, may be taken and prosecuted to the Supreme Court of the United States, in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, or wherein the Constitution of the United States, or a treaty thereof, or an act of Congress, is brought in question and the right claimed thereunder is denied, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars. Such writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken to the Supreme Court of the United States from the district courts. (36 Stats. 1157; 5 Fed. Stats. Ann., 2d ed., p. 893; 2 U. S. Comp. Stats. 1916, § 1215; Foster's Federal Practice, 5th ed., pp. 2388, 2438, 2456, 2539.)

§ 245 (Drawn from § 702, Rev. Stats. and §§ 1, 2, Act Mch. 3, 1885, c. 355. Superseded by Acts admitting Arizona and New Mexico as States). Writs of error and appeals from the final judgments and decrees of the supreme courts of the territories of Arizona and New Mexico may be taken and prosecuted to the Supreme Court of the United States in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars. (36 Stats. 1158.)

§ 246 (As Amended by Act Jan. 28, 1915, c. 22, § 2). (Writs of error and appeals from the Supreme Court of Hawaii and the Supreme

CHAPTER ELEVEN.

PROVISIONS COMMON TO MORE THAN ONE COURT.

SEC.
256. Cases in which jurisdiction of United States courts shall be exclusive of state courts.
257. Oath of United States judges.
258. Judges prohibited from practicing law.
259. Traveling expenses, etc., of circuit justices and circuit and district judges.
260. Salary of judges after resignation.
261. Writs of *ne exeat*.
262. Power to issue writs.
263. Temporary restraining orders.
264. Injunctions; in what cases judge may grant.
265. Injunctions to stay proceedings in state courts.
266. Injunctions based upon alleged unconstitutionality of state statutes; when and by whom may be granted.
267. When suits in equity may be maintained.
268. Power to administer oaths and punish contempts.
269. New trials.
270. Power to hold to security for the peace and good behavior.
271. Power to enforce awards of foreign consuls, etc., in certain cases.
272. Parties may manage their causes personally or by counsel.
273. Certain officers forbidden to act as attorneys.
274. Penalty for violating preceding section.

§ 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states:

First. Of all crimes and offenses cognizable under the authority of the United States.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Fifth. Of all cases arising under the patent-right or copyright laws of the United States.

Sixth. Of all matters and proceedings in bankruptcy.

Seventh. Of all controversies of a civil nature, where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens.

Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice consuls.

§ 257 (Re-enacting § 712, Rev. Stats.). The justices of the Supreme Court, the circuit judges, and the district judges, hereafter appointed, shall take the following oath before they proceed to perform the duties of their respective offices: "I, ——, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as —— according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God." (36 Stats. 1161.)

§ 258 (Re-enacting § 713, Rev. Stats.). It shall not be lawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law. Any person offending against the prohibition of this section shall be deemed guilty of a high misdemeanor. (36 Stats. 1161.)

§ 259 (Drawn from § 554, Rev. Stats.). The circuit justices, the circuit and district judges of the United States, and the judges of the district courts of the United States in Alaska, Hawaii, and Porto Rico, shall each be allowed and paid his necessary expenses of travel, and his reasonable expenses (not to exceed ten dollars per day) actually incurred for maintenance, consequent upon his attending court or transacting other official business in pursuance of law at any place other than his official place of residence, said expenses to be paid by the marshal of the district in which such court is held or official business transacted, upon the written certificate of the justice or judge. The official place of residence of each justice and of each circuit judge while assigned to the commerce court shall be at Washington; and the official place of residence of each circuit and district judge, and of each judge of the district courts of the United States in Alaska, Hawaii, and Porto Rico, shall be at that place nearest his actual residence at which either a circuit court of appeals or a district court is regularly held. Every such judge shall, upon his appointment, and from time to time thereafter whenever he may change his official residence, in writing notify the Department of Justice of his official place of residence. (36 Stats. 1161.)

§ 260 (Re-enacting § 714, Rev. Stats.). When any judge of any court of the United States appointed to hold his office during good behavior resigns his office, after having held a commission or commissions as judge of any such court or courts at least ten years continuously, and having

attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his retirement for the office that he held at the time of his resignation. (36 Stats. 1161.)

§ 261. Writs of *ne exeat* may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any district judge, in cases where they might be granted by the district court of which he is a judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States. (36 Stats. 1162.)

§ 262. The Supreme Court and the district courts shall have power to issue writs of *scire facias*. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. (36 Stats. 1162; 5 Fed. Stats. Anns, 2d ed., p. 928; 2 U. S. Comp. Stats. 1916, § 1239; Foster's Federal Practice, 5th ed., pp. 8, 1469, 1527, 2413; Simkins' Federal Equity Suit, 3d ed., p. 41.)

§ 263 (Repealed § 17, Clayton Act of Oct. 15, 1914, c. 323, 38 Stats. 737). Whenever notice is given of a motion for an injunction out of a district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge.

§ 264 (Drawn from § 719, Rev. Stats.). Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any judge of a district court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the district judge of the district. In case of the absence from the district of the district judge, or of his disability, any circuit judge of the circuit in which the district is situated may grant an injunction or restraining order in any case pending in the district court, where the same might be granted by the district judge.

§ 265 (Re-enacting § 720, Rev. Stats.). The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

§ 266 (As Amended Act March 4, 1913, c. 160). No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall

have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. (36 Stats. 1162, as amended by 37 Stats. 1013.)

§ 267 (Re-enacting § 723, Rev. Stats.). Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. (36 Stats. 1163.)

§ 268. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided,* That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

§ 269. All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.

§ 270. The judges of the Supreme Court and of the circuit courts of appeals and district courts, United States commissioners, and the judges and other magistrates of the several States, who are or may be authorized by law to make arrests for offenses against the United States, shall have the like authority to hold to security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective states, in cases cognizable before them.

§ 271. The district courts and the United States commissioners shall have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration or decree of any consul, vice consul, or commercial agent of any foreign nation, made or rendered by virtue of

authority conferred on him as such consul, vice consul, or commercial agent, to sit as judge or arbitrator in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to his charge, application for the exercise of such power being first made to such court or commissioner, by petition of such consul, vice consul, or commercial agent. And said courts and commissioners may issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration, or decree, and to enforce obedience thereto by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States, until such award, arbitration, or decree is complied with, or the parties are otherwise discharged therefrom, by the consent in writing of such consul, vice consul, or commercial agent, or his successor in office, or by the authority of the foreign government appointing such consul, vice consul, or commercial agent: *Provided, however,* That the expenses of the said imprisonment and maintenance of the prisoners, and the cost of the proceedings, shall be borne by such foreign government, or by its consul, vice consul, or commercial agent requiring such imprisonment. The marshals of the United States shall serve all such process, and do all other acts necessary and proper to carry into effect the premises, under the authority of the said courts and commissioners.

§ 272 (Re-enacting § 747, Rev. Stats.). In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein. (36 Stats. 1164.)

§ 273 (Re-enacting § 748, Rev. Stats.). No clerk, or assistant or deputy clerk, of any territorial, district, or circuit court of appeals, or of the court of claims, or of the Supreme Court of the United States, or marshal or deputy marshal of the United States within the district for which he is appointed, shall act as a solicitor, proctor, attorney, or counsel in any cause depending in any of said courts, or in any district for which he is acting as such officer. (36 Stats. 1164.)

§ 274 (Re-enacting § 749, Rev. Stats.). Whoever shall violate the provisions of the preceding section shall be stricken from the roll of attorneys by the court upon complaint, upon which the respondent shall have due notice and be heard in his defense; and in the case of a marshal or deputy marshal so acting, he shall be recommended by the court for dismissal from office. (36 Stats. 1164.)

Act March 3, 1915, c. 90. (Amendment of suit brought on wrong side of court—Equitable defenses interposed in actions at law—Amending where diverse citizenship is defectively alleged.) That the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended by inserting after section two hundred and seventy-four thereof three new sections, to be numbered, respectively, two hundred and seventy-four a, two hundred and seventy-four b, and two hundred and seventy-four c, reading as follows:

§ 274a. That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendment to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

§ 274b. That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require.

§ 274c. That where, in any suit brought in or removed from any state court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal. (38 Stats. 956.)

CHAPTER TWELVE.

JURIES.

SEC.
275. Qualifications and exemptions of jurors.
276. Jurors, how drawn.
277. Jurors, how to be apportioned in the district.
278. Race or color not to exclude.
279. Venire, how issued and served.
280. Talesmen for petit juries.
281. Special juries.
282. Number of grand jurors.
283. Foreman of grand jury.
284. Grand juries, when summoned.
285. Discharge of grand juries.
286. Jurors not to serve more than once a year.
287. Challenges.
288. Persons disqualified for service on jury in prosecution for polygamy, etc.

§ 275. Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned.

§ 276. All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held; and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations until the whole number required shall be placed therein.

§ 277. Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service.

§ 278. No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color, or previous condition of servitude.

§ 279. Writs of *venire facias*, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or, in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ. Any person named in such writ who resides elsewhere than at the place at which the court is held, shall be served by the marshal mailing a copy thereof to such person commanding him to attend as a juror at a time and place designated therein, which copy shall be registered and deposited in the postoffice addressed to such person at his usual postoffice address. And the receipt of the person so addressed for such registered copy shall be regarded as personal service of such writ upon such person, and no mileage shall be allowed for the service of such person. The postage and registry fee shall be paid by the marshal and allowed him in the settlement of his accounts.

§ 280. When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section.

§ 281. When special juries are ordered in any district court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several states.

§ 282. Every grand jury impaneled before any district court shall consist of not less than sixteen nor more than twenty-three persons. If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose.

§ 283. From the persons summoned and accepted as grand jurors, the court shall appoint the foreman, who shall have power to administer oaths and affirmations to witnesses appearing before the grand jury.

§ 284. No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a *venire* to issue therefor. If the United States attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing to the district judge, or the senior district judge of the district, that the exigencies of the public service require it, the judge may, in his discretion, also order a *venire* to issue for a second grand jury. And said court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. But nothing herein shall operate to extend beyond the time permitted by law the imprisonment before indictment found of a person accused of a crime or offense, or the time during which a person so accused may be held under recognizance before indictment found.

§ 285. The district courts, the district courts of the territories, and the supreme court of the District of Columbia may discharge their grand juries whenever they deem a continuance of the sessions of such juries unnecessary.

§ 286. No person shall serve as a petit juror in any district court more than one term in a year; and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within one year prior to the time of such challenge.

§ 287. When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers.

§ 288. In any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman—

First, that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offense punishable either by sections one or three of an act entitled "An Act to Amend Section Fifty-Three Hundred and Fifty-Two of the Revised Statutes of the United States, in Reference to Bigamy, and for Other Purposes," approved March twenty-second, eighteen hundred and eighty-two, or by section fifty-three hundred and fifty-two of the Revised Statutes of the United States, or the act of July first, eighteen hundred and sixty-two, entitled "An Act to Punish and Prevent the Practice of Polygamy in the Territories of the United States and Other Places, and Disapproving and Annulling Certain Acts of the Legislative Assembly of the Territory of Utah"; or

Second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman.

Any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge; and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court.

But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offense above named; but if he declines to answer on any ground, he shall be rejected as incompetent.

CHAPTER THIRTEEN.

GENERAL PROVISIONS.

SEC.
289. Circuit courts abolished; records of to be transferred to district courts.
290. Suits pending in circuit courts to be disposed of in district courts.
291. Powers and duties of circuit courts imposed upon district courts.
292. References to laws revised in this act deemed to refer to sections of act.
293. Sections 1 to 5, Revised Statutes, to govern construction of this act.
294. Laws revised in this act to be construed as continuations of existing laws.
295. Inference of legislative construction not to be drawn by reason of arrangement of sections.
296. Act may be designated as "The Judicial Code."

§ 289. (New.) The circuit courts of the United States, upon the taking effect of this act, shall be, and hereby are, abolished; and thereupon, on said date, the clerks of said courts shall deliver to the clerks of the district courts of the United States for their respective districts all the journals, dockets, books, files, records, and other books and papers of or belonging to or in any manner connected with said circuit courts; and shall also on said date deliver to the clerks of said district courts all moneys, from whatever source received, then remaining in their hands or under their control as clerks of said circuit courts, or received by them by virtue of their said offices. The journals, dockets, books, files, records, and other books and papers so delivered to the clerks of the several district courts shall be and remain a part of the official records of said district courts, and copies thereof, when certified under the hand and seal of the clerk of the district court, shall be received as evidence equally with the originals thereof; and the clerks of the several district courts shall have the same authority to exercise all the powers and to perform all the duties with respect thereto as the clerks of the several circuit courts had prior to the taking effect of this act. (36 Stats. 1167.)

§ 290. (New.) All suits and proceedings pending in said circuit courts on the date of the taking effect of this act, whether originally brought therein or certified thereto from the district courts, shall thereupon and thereafter be proceeded with and disposed of in the district courts in the same manner and with the same effect as if originally begun therein, the record thereof being entered in the records of the circuit courts so transferred as above provided. (36 Stats. 1167.)

§ 291. Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts.

§ 292. Wherever, in any law not contained within this act, a reference is made to any law revised or embraced herein, such reference, upon the taking effect hereof, shall be construed to refer to the section of this act into which has been carried or revised the provision of law to which reference is so made.

§ 293. The provisions of sections one to five, both inclusive, of the Revised Statutes, shall apply to and govern the construction of the provisions of this act. The words "this title," wherever they occur herein, shall be construed to mean this act.

§ 294. The provisions of this act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest.

§ 295. The arrangement and classification of the several sections of this act have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapter under which any particular section is placed.

§ 296. This act may be designated and cited as "The Judicial Code." (36 Stats. 1168.)

CHAPTER FOURTEEN.

REPEALING PROVISIONS.

SEC.
297. Sections, acts, and parts of acts repealed.
298. Repeal not to affect tenure of office, or salary, or compensation of incumbents, etc.
299. Accrued rights, etc., not affected.
300. Offenses committed, and penalties, forfeitures, and liabilities incurred, how to be prosecuted and enforced.
301. Date this act shall be effective.

§ 297. The following sections of the Revised Statutes and acts and parts of acts are hereby repealed:

Sections five hundred and thirty to five hundred and sixty, both inclusive; sections five hundred and sixty-two to five hundred and sixty-four, both inclusive; sections five hundred and sixty-seven to six hundred and twenty-seven, both inclusive; sections six hundred and twenty-nine to six hundred and forty-seven, both inclusive; sections six hundred and fifty to six hundred and ninety-seven, both inclusive; section six hundred and ninety-nine; sections seven hundred and two to seven hundred and fourteen, both inclusive; sections seven hundred and sixteen to seven hundred and twenty, both inclusive; section seven hundred and twenty-three; sections seven hundred and twenty-five to seven hundred and forty-nine, both inclusive; sections eight hundred to eight hundred and twenty-two, both inclusive; sections ten hundred and forty-nine to ten hundred and eighty-eight, both inclusive; sections ten hundred and ninety-one to ten hundred and ninety-three, both inclusive, of the Revised Statutes.

"An Act to Determine the Jurisdiction of Circuit Courts of the United States and to Regulate the Removal of Causes from State Courts, and for Other Purposes," approved March third, eighteen hundred and seventy-five.

Section five of an act entitled "An Act to Amend Section Fifty-Three Hundred and Fifty-Two of the Revised Statutes of the United States, in Reference to Bigamy, and for Other Purposes," approved March twenty-second, eighteen hundred and eighty-two; but sections six, seven, and eight of said act, and sections one, two, and twenty-six of an act entitled "An Act to Amend an Act Entitled 'An Act to Amend Section Fifty-Three Hundred and Fifty-Two of the Revised Statutes of the United States, in Reference to Bigamy, and for Other Purposes,' Approved March Twenty-second, Eighteen Hundred and Eighty-Two," approved March third, eighteen hundred and eighty-seven are hereby continued in force.

"An Act to Afford Assistance and Relief to Congress and Executive Departments in the Investigation of Claims and Demands against the Government," approved March third, eighteen hundred and eighty-three.

"An Act Regulating Appeals from the Supreme Court of the District of Columbia and the Supreme Courts of the Several Territories," approved March third, eighteen hundred and eighty-five.

"An Act To Provide for the Bringing of Suits against the Government of the United States," approved March third, eighteen hundred and eighty-seven, except sections four, five, six, seven, and ten thereof.

Sections one, two, three, four, six, and seven of an act entitled "An Act to Correct the Enrollment of an Act Approved March Third, Eighteen Hundred and Eighty-Seven, Entitled 'An Act to Amend Sections One, Two, Three, and Ten of an Act to Determine the Jurisdiction of the Circuit Courts of the United States, and to Regulate the Removal of Causes from the State Courts, and for Other Purposes,' approved March Third, Eighteen Hundred and Seventy-Five," approved August thirteenth, eighteen hundred and eighty-eight.

"An Act to Withdraw from the Supreme Court Jurisdiction of Criminal Cases not Capital and Confer the Same on the Circuit Courts of Appeals," approved January twentieth, eighteen hundred and ninety-seven.

"An Act to Amend Sections One and Two of the Act of March Third, Eighteen Hundred and Eighty-Seven, Twenty-Fourth Statutes at Large, Chapter Three Hundred and Fifty-Nine," approved June twenty-seventh, eighteen hundred and ninety-eight.

"An Act to Amend the Seventh Section of the Act Entitled 'An Act to Establish Circuit Courts of Appeals and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes,' Approved March Third, Eighteen Hundred and Ninety-One, and the Several Acts Amendatory Thereto," approved April fourteenth, nineteen hundred and six.

All acts and parts of acts authorizing the appointment of United States circuit or district judges, or creating or changing judicial circuits, or judicial districts or divisions thereof, or fixing or changing the times or places of holding court therein, enacted prior to February first, nineteen hundred and eleven.

Sections one, two, three, four, five, the first paragraph of section six, and section seventeen of an act entitled "An Act to Create a Commerce Court, and to Amend an Act Entitled 'An Act to Regulate Commerce,' Approved February Fourth, Eighteen Hundred and Eighty-Seven, as Heretofore Amended, and for Other Purposes," approved June eighteenth, nineteen hundred and ten.

Also other acts and parts of acts, in so far as they are embraced within and superseded by this act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this act had not been passed. (36 Stats. 1168. In general. United States v. Winslow, 227 U. S. 202, 57 L. Ed. 481, 33 Sup. Ct. 253.)

§ 298. The repeal of existing laws providing for the appointment of judges and other officers mentioned in this act, or affecting the organ-

ization of the courts, shall not be construed to affect the tenure of office of the incumbents (except the office be abolished), but they shall continue to hold their respective offices during the terms for which appointed, unless removed as provided by law; nor (except the office be abolished) shall such repeal affect the salary or fees or compensation of any officer or person holding office or position by virtue of any law. (36 Stats. 1169. In general, United States v. New Departure Mfg. Co., 195 Fed. 778.)

§ 299. The repeal of existing laws, or the amendments thereof, embraced in this act, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding, including those pending on writ of error, appeal, certificate, or writ of *certiorari*, in any appellate court referred to or included within, the provisions of this act, pending at the time of the taking effect of this act, but all such suits and proceedings, and suits and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendments had not been made. (36 Stats. 1169. In general, Washington Home for Incurables v. Am. Security Co., 224 U. S. 486, 56 L. Ed. 854, 32 Sup. Ct. 554.)

§ 300. All offenses committed, and all penalties, forfeitures, or liabilities incurred prior to the taking effect hereof, under any law embraced in, amended, or repealed by this act, may be prosecuted and punished, or sued for and recovered, in the district courts, in the same manner and with the same effect as if this act had not been passed. (36 Stats. 1169. In general, In re Steiner et al., 195 Fed. 299.

§ 301. This act shall take effect and be in force on and after January first, nineteen hundred and twelve.

Approved March 3, 1911. (36 Stats. 1169.)

argument is permitted on such petitions but they must be called up and submitted in open court by counsel for petitioner, or by some attorney in his behalf.

If a respondent desires to oppose a petition, thirty (30) copies of a brief for such respondent must be filed. These briefs must bear the name of a member of the bar of this court, who should also enter an appearance for the respondent. It is not necessary, however, for such counsel to be present in court when the petition is submitted.

All papers in the case must be filed not later than the Saturday preceding the Monday fixed for the submission of the petition.

JAMES D. MAHER,
Clerk, Supreme Court of the United States.

ORDER FOR APPEARANCE.

File No. ——.

Supreme Court of the United States.

No. ——, October Term, 191—.

——,

vs.

——,

The clerk will enter my appearance as counsel for the ——

(Name)——
(P. O. Address) ——

NOTE.—Must be signed by a member of the bar of the supreme court United States. Individual and not firm names must be signed.

RULES OF THE SUPREME COURT OF THE UNITED STATES.

Promulgated December 22, 1911.

With Amendments of February 26, April 1, and June 10, 1912, March 20 and June 12, 1916, and March 26, 1917.

Index to these Rules at the end thereof.

RULES OF THE SUPREME COURT OF THE UNITED STATES.

1.

CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice, either as attorney or counsellor, in this court, or in any other court, while he shall continue to be clerk of this court.

2. The clerk shall not permit any original record or paper to be taken from the courtroom, or from the office, without an order from the court, except as provided by Rule 10.

2.

ATTORNEYS AND COUNSELLORS.

1. It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the highest courts of the States to which they respectively belong, and that their private and professional characters shall appear to be fair.

2. They shall respectively take and subscribe the following oath or affirmation, viz:

I, —— ——, do solemnly swear (or affirm) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

3.

PRACTICE.

This court considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary.

4.

BILL OF EXCEPTIONS.

The judges of the district courts in allowing bills of exceptions shall give effect to the following rules:

1. No bill of exceptions shall be allowed which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise.

5.

PROCESS.

1. All process of this court shall be in the name of the President of the United States, and shall contain the Christian names, as well as the surnames, of the parties.

2. When process at common law or in equity shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such State.

3. Process of subpoena, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpoena, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*.

6.

MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. Forty-five minutes on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

4. All motions to dismiss writs of error and appeals, except motions to docket and dismiss under Rule 9, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief of argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

5. The court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as not to need further argument. The same procedure shall apply to and control such motions as is provided for in cases of motions to dismiss under paragraph 4 of this rule.

6. Although the court upon consideration of a motion to dismiss or a motion to affirm may refuse to grant the motion, it may nevertheless, if the conclusion is arrived at that the case is of such a character as not to justify extended argument, order the cause transferred for hearing to a summary docket. The hearing of the causes on such docket will be expedited, the court providing from time to time for such speedy disposition of the docket as the regular order of business may permit, and on the hearing of such causes one-half hour will be allowed each side for oral argument.

7. The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

7.

LAW LIBRARY.

1. During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also one dollar per day for each day's detention beyond the limited time.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one except the justices of the court.

8.

WRIT OF ERROR AND APPEAL, RETURN AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

In order to enable the Clerk to perform such duty and for the purpose of reducing the size of transcripts of record in cases brought to this Court by appeal or writ of error, by eliminating all papers not necessary to the consideration of the questions to be reviewed, it shall be the duty of the appellant or plaintiff in error or his attorney to file with the clerk of the lower court, together with proof or acknowledgment of service of a copy on the appellee or defendant in error, or his counsel, a *praecipe* which shall indicate the portions of the record to be incorporated into the transcript of the record on such appeal or writ of error. Should the appellee or defendant in error, or his counsel, desire additional portions of the record incorporated into the transcript

of the record to be filed in this Court, he shall file with the clerk of the lower court his *praecipe* also, within ten days thereafter, (unless the time shall be enlarged by a judge of the lower court or by a Justice of this Court), indicating such additional portions of the record desired by him.

The clerk of the lower court shall transmit to this Court as the transcript of the record in the case only the portions of the record below designated by both parties as above provided.

The parties or their counsel, however, may agree by written stipulation to be filed with the clerk of the lower court the portions of the record which shall constitute the transcript of record on appeal or writ of error, and the clerk in such case shall transmit only the papers designated in such stipulation.

If this Court shall find that portions of the record unnecessary to a proper presentation of the case have been incorporated into the transcript by either party, the Court may order that the whole or any part of the Clerk's fee for supervising the printing and of the cost of printing the record be paid by the offending party.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day, except in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, Idaho, Hawaii and Porto Rico, when the time shall be extended to sixty days and from the Philippine Islands to one hundred and twenty days.

6. The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact, and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

9.

DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

10.

PRINTING RECORDS.

1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall make such cash deposit with the clerk for

the payment of his fees as he may require or otherwise satisfy him in that behalf.

2. Immediately after the designation of the parts of the record to be printed or the expiration of the time allotted therefor, the clerk shall make an estimate of the cost of printing the record, his fee for preparing it for the printer and supervising fee, and other probable fees, and upon application therefor shall furnish the same to the party docketing the case. If such estimated sum be not paid within ninety days after the cause is docketed, it shall be the duty of the clerk to report that fact to the court, and thereupon the cause will be dismissed, unless good cause to the contrary is shown.

3. Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 8, section 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of said fees.

9. When the record is filed, or within twenty days thereafter, the plaintiff in error or appellant may file with the clerk a statement of the points on which he intends to rely and of the parts of the record which he thinks necessary for the consideration thereof, with proof of service

of the same on the adverse party. The adverse party, within thirty days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record and the points so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk under Rule 24, section 7, shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

11.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceedings, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will order that a translation be supplied and inserted in the record.

12.

FURTHER PROOF.

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any district court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any district court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon

interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: Provided, however, That nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

13.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

14.

CERTIORARI.

No *certiorari* for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for *certiorari* must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

15.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error or appellee shall be entitled to have

the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error or appellant he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: Provided, however, That a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, or District from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in such court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit can not be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: Provided, however, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being

left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing: And provided, also, That in every such case if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within time as above required, by the opposite party, the case shall abate: And provided, also, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

16.

NO APPEARANCE OF PLAINTIFF IN ERROR OR APPELLANT.

Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant in error or appellee may have the plaintiff in error or appellant called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

17.

NO APPEARANCE OF DEFENDANT IN ERROR OR APPELLEE.

Where the defendant in error or appellee fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff in error or appellant and to give judgment according to the right of the case.

18.

NO APPEARANCE OF EITHER PARTY.

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff in error or appellant.

19.

NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

20.

PRINTED ARGUMENTS.

1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and, in addition, appeals from the Court of Claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but thirty copies of the arguments, signed by attorneys or counselors of this court, must be first filed.

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

4. No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

21.

BRIEFS.

1. The counsel for plaintiff in error or appellant shall file with the clerk of the court, at least three weeks before the case is called for argument, thirty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in the order here stated—

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2) A specification of the errors relied upon, which in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set

out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk thirty printed copies of his argument, at least one week before the case is called for hearing. His brief shall be of like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

7. No brief or printed argument, required by the foregoing sections, shall be filed by the clerk unless the same shall be accompanied by satisfactory proof of service upon counsel for the adverse party.

8. Every brief of more than twenty pages shall contain on its front fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where the cases are cited.

22.

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. One and one-half hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. But in cases certified from the Circuit Courts of Appeals, cases involving solely the jurisdiction of the court below, and cases under the act of March 2, 1907, 34 Stats. 1246, forty-five minutes only on each side will be allowed for the argument unless the time be extended. The time thus allowed may be apportioned between the counsel on the same side, at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

23.

INTEREST.

1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed if specially directed by the court.

24.

COSTS.

1. In all cases where any suit shall be dismissed in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties, except where the dismissal shall be for want of jurisdiction, when the costs incident to the motion to dismiss shall be allowed.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise

ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo,* to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

7. In pursuance of the act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, five dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept, and paid.

For an admission to the bar and certificate under seal, ten dollars.

For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio; but when the necessary printed copies of the record, as printed for the use of the lower court, shall be furnished, the fee for supervising shall be five cents per folio.

For making a manuscript copy of the record, when required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing.

For issuing a writ of error and accompanying papers, five dollars.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

For every printed copy of any opinion of the court or any justice thereof, certified under seal, two dollars.

25.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be printed. And it shall be the duty of the clerk to cause the same to be forthwith printed, and to deliver a copy to the reporter as soon as the same shall be printed.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded.

26.

CALL AND ORDER OF THE DOCKET.

1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall be continued to the next term of the court unless some good and satisfactory reason to the contrary shall be shown to the court.

2. Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

3. Criminal cases may be advanced by leave of the court on motion of either party.

4. Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, or which may be entitled to precedence under the provisions of any act of Congress, may also by leave of the court be advanced on motion of the Attorney-General.

6. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

7. No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court.

8. Two or more cases, involving the same question, may, by the leave of the court, be heard together, but they must be argued as one case.

9. If, after a case has been passed, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

10. No stipulation to pass a case will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

27.

ADJOURNMENT.

The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon, and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

28.

DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall in vacation,

by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

29.

SUPERSEDEAS.

Supersedeas bonds in the district courts and Circuit Courts of Appeals must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

30.

REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

31.

FORM OF PRINTED RECORDS AND BRIEFS.

All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound

together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.

32.

WRITS OF ERROR AND APPEALS IN CASES INVOLVING JURISDICTION OF LOWER COURT.

Cases brought to this court by writ of error or appeal, where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by Rule 6, in regard to motions to dismiss writs of error and appeals.

33.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted.

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this it not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

34.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of *habeas corpus*, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

35.

ASSIGNMENT OF ERRORS.

1. Where an appeal or a writ of error is taken from a district court direct to this court, under section 238 of the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, chapter 231, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis,* whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

2. The plaintiff in error or appellant shall cause the record to be printed, according to the provisions of sections 2, 3, 4, 5, 6, and 9, of Rule 10.

36.

APPEALS AND WRITS OF ERROR FROM DISTRICT COURTS.

1. An appeal or a writ of error from a district court direct to this court, in the cases provided for in §§ 238 and 252 of the act entitled, "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, chapter 231, may be allowed, in term time or in vacation by any justice of this court, or by any circuit judge assigned to the district court, or by any district judge within his district, and the proper security be taken and the citation signed by him,

and he may also grant a *supersedeas* and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under section 238, the district court, or any judge thereof, or any justice of this court, or any circuit judge assigned to the district court, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

37.

CASES CERTIFIED AND PETITIONS FOR WRITS OF CERTIORARI.

1. Where, under section 239 of the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, chapter 231, a Circuit Court of Appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

3. Where an application is submitted to this court for a writ of *certiorari* to review a decision of a Circuit Court of Appeals or any other court, it shall be necessary for the petitioner to furnish as an exhibit to the petition a certified copy of the entire transcript of record of the case, including the proceedings in the court to which the writ of *certiorari* is asked to be directed. The petition shall contain only a summary and short statement of the matter involved and the general reasons relied on for the allowance of the writ. A failure to comply with this provision will be deemed a sufficient reason for denying the petition. Thirty printed copies of such petition and of any brief deemed necessary shall be filed. Notice of the date of submission of the petition, together with a copy of the petition and brief, if any, in support of the same shall be served on the counsel for the respondent at least two weeks before such date in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which cases the time shall be at least three weeks. The brief for the respondent, if any, shall be filed at least three days before the date fixed for the submission of the petition. Oral argument will not be permitted on such petitions,

and no petition will be received within three days next before the day fixed upon for the adjournment of the court for the term.

4. An application for a writ of *certiorari* will be deemed in time when the petition therefor, accompanied by the printed record and brief, is filed within the period prescribed by law: Provided this is followed by submitting the petition in open Court on some motion day not later than the first one which follows a period of four weeks after such filing. Notice of the date of submission and copies of the petition and brief must be served as required by Section 3 of this rule. (Promulgated March 26, 1917.)

38.

INTEREST, COST, AND FEES.

The provisions of Rules 23 and 24 of this court, in regard to interest and costs and fees, shall apply to writs of error and appeals and reviews under the provisions of sections 238, 239, 240, and 241 of the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, chapter 231.

39.

MANDATES.

Mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term.

40.

PRACTICE IN CASES FROM CIRCUIT COURTS OF APPEALS.

The provisions of these rules relating to the practice on direct writs of error to and appeals from the district courts shall also be deemed to relate to and cover the practice on writs of error to and appeals from the Circuit Courts of Appeals.

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RULES OF THE UNITED STATES CIRCUIT COURTS OF APPEALS.

(INDEXED IN GENERAL INDEX.)

RULES OF THE UNITED STATES CIRCUIT COURTS OF APPEALS.

STATEMENT.

The rules of the United States Circuit Courts of Appeals as they exist in each of the nine circuits are so similar that but one statement of a rule is made where the rule is alike in a number of the circuits. Where there is a variance in different circuits the variance is shown either by repeating the rule as it is in the several differing circuits, or by explaining the difference.

The rule in any particular circuit may be ascertained by noting the number of the circuit at the head of each rule. If a blank line appears in the place allotted to that circuit number, then its rule will be found below with the number of the circuit over it. Follow down vertically beneath the blank line in the place allotted to the circuit number until the number appears.

RULE 1.

1st	2d	3d	4th	5th	——	7th	8th	9th

1. NAME.

The court adopts "United States Circuit Court of Appeals for the —— Circuit" as the title of the court.

The above rule is § 1, rule 2, in sixth circuit, and its rule 1 is as follows:

6th

1. DEFINITIONS.

In these rules "counsel" shall include attorneys, solicitors, proctors, and advocates; "appellant" shall include, also, plaintiff in error, petitioner for review or *mandamus*, and any other party seeking review in this court; "appellee" shall include, also, defendant in error and any other party respondent in this court.

RULE 2.

1st	2d	3d	4th	5th	——	7th	8th	9th

2. SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower

part of the outer edge, running from left to right; and the words "—— Circuit" in two lines, in the center, with a dash beneath.

The above is § 2, rule 2, in the sixth circuit.

6th

2. NAME AND SEAL.

1. Same as rule 1 of the other circuits above.
2. Same as rule 2 of the other circuits above.

RULE 3.

1st —— —— —— —— —— —— —— ——

3. TERMS AND SESSIONS.

One term of this court shall be held annually at the city of Boston at ten o'clock in the forenoon on the first Tuesday of October. Stated sessions thereof shall be there held at the same hour on the first Tuesday of every month, and may be adjourned to such times and places as the court may from time to time designate. But, unless otherwise ordered, any adjournment shall be held to have been made to the first day of the next stated session.

2d

One term of this court shall be held annually at the city of New York on the first Monday of October, and shall be adjourned to such times and places as the court may from time to time designate.

3d

The terms of this court shall commence and be held on the first Tuesday of March and the first Tuesday of October in each year, at the city of Philadelphia.

4th

1. There shall be held in the city of Richmond, Virginia, three regular terms of this court; one on the first Tuesday of January, one on the first Tuesday of April, and one on the first Tuesday of October, in each year; and there shall be held in the city of Ashville, North Carolina, one regular term of this court on the first Tuesday of July, in each year.

2. Special sessions of this court shall be held in Richmond, Virginia, on the second Tuesday of every month of the year except in those months in which regular terms of the court are held. During said sessions such orders, judgments or decrees as may be necessary concerning pending

cases may be considered and disposed of, opinions in cases theretofore argued may be filed and decrees and judgments relating thereto entered, mandates issued, and any such further action taken as is authorized by the statute in such case made and provided.

3. If at any such special session no judge shall be in attendance, the clerk shall adjourn the court until the next day, or to such time as the senior circuit judge shall direct, and then in case no direction be made, to the next session or term of the court.

5th

A session of this court shall be held annually at the city of Atlanta, Georgia, on the first Monday in October; at the city of Montgomery, Alabama, on the third Monday in October; at the city of Fort Worth, Texas, on the first Monday in November; at the city of New Orleans, Louisiana, on the third Monday in November, and shall be adjourned to such other time and places as the court may from time to time order and designate.

6th

One term of this court shall be held annually on the Tuesday after the first Monday in October, and adjourned sessions on the Tuesday after the first Monday of each other month in the year, except August and September. At the July session, no causes will be heard, except upon the special order of the court.

All sessions shall be held at Cincinnati, unless otherwise specially ordered by the court.

7th

A term of this court shall be held annually at the city of Chicago on the first Tuesday in October, and continue until the first Tuesday in October of the succeeding year. Every term shall be adjourned to such time and places as the court may from time to time designate. Unless otherwise specially ordered, the Court will hold at Chicago three sessions for the hearing of causes during each term, beginning on the first Tuesdays in October and January, respectively, and the second Tuesday in April.

8th

1. Three terms of this court will be held annually, one at the city of St. Paul on the first Monday of May, one at the city of Denver, on the first Monday of September, and one at the city of St. Louis on the first Monday of December.

2. Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas, and Oklahoma, in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court, and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, are filed on or before the first day of April, and cases from Colorado, Utah, Wyoming, and New Mexico in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, and stipulations of the parties for their hearing at the May term in St. Paul are filed on or before the first day of April, and those only, will be heard at the succeeding May term of the court in St. Paul.

3. Cases from Colorado, Wyoming, Utah, and New Mexico in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, are filed on or before the first day of July and cases from the remainder of the circuit in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, and stipulations of the parties for their hearing at the September term in Denver are filed on or before the first day of July, and those only, will be heard at the succeeding September term in Denver.

4. Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas, and Oklahoma in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, are filed on or before the first day of October, and cases from Colorado, Wyoming, Utah, and New Mexico in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their

counsel, and stipulations of the parties for their hearing at the December term in St. Louis are filed on or before the first day of October, and those only, will be heard at the succeeding December term in St. Louis.

5. These terms of the court may be adjourned to such times and places as the court may from time to time designate.

9th

One term of this court shall be held annually at the city of San Francisco on the first Monday of October, and shall be adjourned to such times and places as the court may from time to time designate. (See, also, rule 36.)

RULE 4.

—— 2d 3d 4th 5th —— 7th 8th 9th

4. QUORUM.

1. If at any term ["time" for "term," 2d circuit. Add after "term," "or session," 7th and 9th circuit] a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time [or "from place to place," 4th circuit] or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term [add "or session," 7th circuit] after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from ["time to time," 6th circuit] day to day until there is a quorum, or may adjourn without day ["and in the absence of all the judges, the clerk may adjourn the court from day to day," 3d circuit].

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process, depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

1st.

4. QUORUM.

1. In the absence of a quorum on any day appointed for holding a term, or on any day to which the court is adjourned, any judge who attends shall adjourn the court from day to day; or, if no judge is present, the clerk shall so adjourn; and, in the absence of all the judges and the clerk, the marshal or his deputy shall so adjourn. But the court may, from time to time, as provided in rule 3, enter orders directing an

adjournment, or adjournments, for longer periods than from day to day, or *sine die*.

2. Same as section 2 for the other circuits above.

6th

Same as section 1 for the 5th circuit with the addition of the clause "or, in the absence of any judge, the clerk may adjourn the court for successive intervals of one week until a judge attends" at the end of such section.

There is no section 2.

RULE 5.

5. CLERK.

1st 2d —— —— —— —— —— 8th ——

1. The clerk's office shall be kept at the place designated in the act creating the court at which a term shall be held annually.

1. The clerk's office shall be kept in the city of

3d Philadelphia **6th** Cincinnati

4th Richmond **7th** Chicago

5th New Orleans **9th** San Francisco

1st 2d 3d 4th 5th 6th 7th 8th 9th

2. The clerk shall not practice, either as attorney or counselor, in this court or in any other court [omit balance of sentence in 6th and 7th circuits] while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by § 794 of the Revised Statutes and shall give bond in a sum to be fixed ["in the sum of $10,000," 5th circuit] and with sureties to be approved, by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safekeeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the courtroom or from the office, without an order from the court.[1]

[1] In the 6th circuit add, "or a judge thereof." In the 9th circuit add, "except as provided in rule 23."

—— —— —— —— —— —— 7th —— ——

The following sections are added:

5. All fees collected by the clerk, which are not properly taxable as costs in any case, and which are not by law required to be by him deposited in the Treasury of the United States, shall constitute a fund to be expended by the clerk, under the direction of the court, in the purchase of law books for the library of the court.

6. The clerk shall keep an accurate and itemized account of all moneys received by him officially, including costs and fees in cases in the court and fees and moneys collected on any account whatever, and shall deposit the same as received daily to his credit as clerk, and separately from all individual accounts, in a national bank designated by the senior judge, and at the end of each month, and whenever required by the court or senior judge, shall submit to the senior judge a detailed report showing by items all moneys received and all moneys paid out during the month, and the total balances on hand from each and all sources of receipt. Each report shall be accompanied by a statement, over the signature of the cashier or other officer of the bank in which the deposit is kept, of the amount in the bank to the credit of the clerk at the close of the last day included in the report.

RULE 6.

6. MARSHAL, CRIER AND OTHER OFFICERS.

—— —— 3d 4th 5th —— —— —— 9th.

The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may from time to time order.

1st

Same as above, omitting the words "and crier" after the words "the marshal."

2d

1. Every marshal and deputy marshal shall, before he enters on the duties of his appointment, take an oath in the form prescribed by § 782 of the Revised Statutes, and the marshal shall, before he enters on the duties of his office, give bond in a sum to be fixed, and with sureties to be approved, by the court, for the faithful performance of said duties by himself and his deputies. Said bond shall be filed and recorded in the office of the clerk of the court.

2. Same as rule above in other circuits.

6th

1. The crier and bailiffs of the district court of any district where this court may be in session, are hereby authorized to act also during such session as crier and bailiffs of this court.

2. A crier or bailiff specially appointed for this court shall, before he enters on his duties, take an oath in the form prescribed by § 782 of the Revised Statutes.

3. Same as § 1 in 3d circuit.

7th

§ 1 same as § 2 in 6th circuit.

§ 2 same as rule in other circuits first above.

8th

Same as rule in other circuits first above with the addition of the clause "of the district in which a term or session of the court is held," after the first two words, "the marshal."

RULE 7.

7. ATTORNEYS AND COUNSELORS.

1st 2d —— —— —— —— 7th —— ——

All attorneys and counselors admitted to practice in the Supreme Court of the United States, or in any circuit or district court [1] of the United States,[2] shall become attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by rule 2 of the Supreme Court of the United States and on subscribing the roll;[3] but no fee shall be charged therefor.

3d

7. ATTORNEYS AND COUNSELORS.

Same as in 2d circuit, adding: "and all attorneys and counselors of the district court of the United States for the 3d circuit, shall be attorneys and counselors of this court without taking any further oath."

4th

7. ATTORNEYS AND COUNSELORS.

All attorneys and counselors admitted to practice in the Supreme Court of the United States, or in any District Court of the United States,

[1] "or district court," omitted in 1st and 7th circuits.

[2] "or in the supreme court of a state in this circuit may become," added in 7th circuit.

[3] Balance of sentence from note number omitted in 7th circuit.

shall become attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States, subscribing the roll, and paying to the Clerk a fee of $5. The monies received by the clerk under this rule shall be accounted for to the court, and be expended under its direction for the purchase of law books for the court library.

5th

7. ATTORNEYS AND COUNSELORS.

All attorneys and counselors admitted to practice in the Supreme Court of the United States, or any circuit court of the United States, upon filing certificate of such admission with the clerk of this court, and upon taking an oath or affirmation in the following form, viz.:

"I, ——, do solemnly swear [or affirm] that I will demean myself as an attorney and counselor of this court uprightly and according to law, and that I will support the Constitution of the United States."

[a copy of which shall be filed with the clerk], shall become attorneys and counselors of this court; provided, however, that any attorney or counselor eligible to admission as an attorney and counselor of this court may be admitted to practice, on motion in open court, upon taking the oath or affirmation as prescribed, and subscribing the roll.

On each admission the clerk will collect ten dollars ($10) to be applied to the purchase of law books for the use of the court and bar.

6th

7. ATTORNEYS AND COUNSELORS.

An attorney and counselor admitted to practice and in good standing in the Supreme Court or in a district court of the United States, or in the court of last resort in the state of his residence, may become attorney and counselor in this court on taking an oath or affirmation as prescribed by rule 2 of the Supreme Court of the United States, and upon subscribing the roll. On each admission the clerk will collect $10 to be applied to the purchase, repair and rebinding of law books for the use of the court and bar. Every person taking the oath and paying such sum shall be entitled to a certificate of his admission, signed by the clerk.

8th

7. ATTORNEYS AND COUNSELORS.

1. All attorneys and counselors admitted to practice in the Supreme Court of the United States, or in any circuit court or district court of

the United States, or in the supreme court of any state in this circuit, may, upon motion of some member of the bar of this court, be admitted as attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by rule 2 of the Supreme Court of the United States and on subscribing the roll; but no fee shall be charged therefor.

2. And any attorney and counselor admitted to practice in the Supreme Court of the United States or in the supreme court of any state or in the district or circuit courts of the United States for this circuit, may be admitted by order of this court to practice and may be enrolled as an attorney and counselor of this court, thirty days after he furnishes to the clerk of this court a certificate of a clerk or judge of any one of the courts named that the applicant is an attorney of any one of said courts; and upon subscribing and forwarding to the clerk the following oath: "I do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of the circuit court of appeals for the eighth circuit, uprightly and according to law; and that I will support the Constitution of the United States. So help me God."

9th

7. ATTORNEYS AND COUNSELORS.

All attorneys admitted to practice in the Supreme Court of the United States, or in any District Court of the Ninth Circuit, shall be deemed attorneys of the Circuit Court of Appeals for the Ninth Circuit; but such attorneys, on or before their first appearance in open court, in said court, shall take an oath or affirmation, in the form prescribed by Rule 2 of the Supreme Court of the United States and subscribe the Roll of Attorneys. All other persons who have been admitted to practice in the highest court of any State or Territory, upon presenting satisfactory evidence of good moral character and fair professional standing, may be admitted to practice in said court, upon taking the oath so prescribed, and subscribing the Roll of Attorneys.

Appearance cannot be entered unless counsel is a member of the bar of this court, or of the supreme court of the United States, or of a district court within the ninth circuit. Briefs signed by counsel who are not members of the bar of this court or fully qualified under the provisions of this rule will not be considered by the court.

RULE 8.

1st 2d 3d 4th 5th —— —— 8th 9th

8. PRACTICE.

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

6th

§ 1 same as above.

§ 2 same as rule 9 in other circuits.

7th

8. PRACTICE.

The practice, so far as may be, shall be the same as in the Supreme Court of the United States.

RULE 9.

9. PROCESS.

1st 2d 3d 4th 5th —— 7th 8th 9th

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

In the sixth circuit this is contained in rule 8, and the following is rule 9 in that circuit.

6th

9. SERVICE OF PAPERS.

1. Copies of all papers or proceedings filed by any party in any cause shall, at or before the time of filing, be served upon counsel representing each adverse interest, and proof or acknowledgment of such service shall be indorsed upon each paper filed. The clerk may insist upon such proof as a prerequisite to filing, or may file and require the prompt furnishing of such proof, as he may in each case think proper.

2. Service may be personal or by mail. If personal, it shall consist of delivery at his office to counsel or to a clerk therein. If by mail, it shall consist in depositing the same in the postoffice with postage paid, addressed to the counsel at his postoffice address, which address shall include his street and number, unless the same are unknown. Each proof of service shall show a full compliance with this rule.

RULE 10.

1st —— —— —— 5th —— —— 8th 9th

10. BILL OF EXCEPTIONS.

The judges of the ["circuit and" omitted in 8th circuit] district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

2d

10. BILL OF EXCEPTIONS.

The judges of the district courts shall not allow any bill of exceptions unless the same contain the whole charge of the court to the jury. No general exception to the whole of such charge shall be allowed, but the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts.

3d

10. BILL OF EXCEPTIONS.

1. The judges of the District Courts shall not allow any general exception to the whole of the charge to the jury in a civil or a criminal trial at common law, nor shall a series of exceptions be allowed which produces the same result. But the party excepting shall state distinctly and separately the several matters in such charge to which he excepts, and only such matters shall be included in the bill of exceptions and allowed by the court. Exceptions to the charge or to the judge's action upon the requests for instruction shall be taken immediately on the conclusion of the charge before the jury retire, shall be specified in writing or dictated to the stenographer, and shall be specific and not general.

2. Exceptions to the admission or rejection of evidence shall be specific and not general, and the bill of exceptions to such admission or rejection shall contain only so much of the evidence admitted or offered and rejected as is necessary for the presentation and decision of the questions saved for review. Unless there be saved a question which requires the consideration of all the evidence, a bill of exceptions containing all of it shall not be allowed.

4th

10. BILL OF EXCEPTIONS.

1. Same as 1st circuit, omitting "circuit and " in first line.

2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise.

6th

10. BILL OF EXCEPTIONS.

1. The assignments of error required by rule 11 shall be filed at or before the settling of the bill of exceptions. The evidence in a bill of exceptions shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of some one of the questions presented by the assignments of error being omitted, and the testimony of witnesses being stated only in narrative form, save that, if either party desires it and the judge so directs, any part of the testimony shall be reproduced in the exact words of the witness.

2. No general exception to the whole or any charge to a jury on trials at law shall be allowed in any bill of exceptions. Exceptions to charge, in order to be allowed in a bill of exceptions, must be taken before the jury retires and must state distinctly the several matters of law to which exception is taken. In cases where exception is taken to part of a charge, and such exception may be affected by other parts or by the charge as a whole, the entire charge shall be included in the bill of exceptions.

7th

10. BILL OF EXCEPTIONS AND TRANSCRIPT.

1. Same as 1st circuit.

2. A bill of exceptions shall contain of the evidence only such a statement as is necessary for the presentation and decision of questions saved for review and unless there be saved a question which requires the consideration of all the evidence, a bill of exceptions containing all the evidence shall not be allowed.

3. No document shall be copied more than once in a bill of exceptions or in a transcript of the record of the case, but instead there shall be inserted a reference to the one copy set out. A motion for a new trial and orders and entries relating thereto shall not be set out in the tran-

script unless required by written *precipe,* of which a copy shall also be set out.

4. The cost of unnecessary matter in the bill of exceptions or transcript or in the printed record shall not be recovered of the appellee or defendant in error, and in its discretion the court will in case of dispute appoint a referee to determine and report what was necessary therein, and will tax the cost of the reference as shall seem just.

RULE 11.

1st 2d —— 4th —— —— 7th 8th 9th

ASSIGNMENT OF ERRORS.

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out[1] separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors[2] shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment[3] of errors shall set out the part referred to *totidem verbis,* whether it be in instructions given or in instructions refused.[4] Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

1 In the 7th circuit substitute "specify" for the words "set out."
2 Substitute "specification of the error" for "assignment of errors."
3 Substitute "each specification" for "the assignment."
4 Add "and shall state distinctly the grounds of objection to an instruction given."
In the 7th circuit a note refers to rule 24. In the 9th circuit, see note to admiralty rule 1.

3d

11. ASSIGNMENT OF ERRORS.

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, his assignments of error, as required by § 997 of the Rev. Stats., which shall set out separately and particularly each error asserted and intended to be urged. (See rule 14, § 6.)

When the error alleged is to the admission or the rejection of evidence, the assignment shall quote the full substance of the evidence admitted or rejected; when the error alleged is to the charge of the court, the assignment shall set out the part referred to *totidem verbis,* whether it be in instructions given or in instructions refused; when the error alleged is based on the trial court's refusal to enter a judgment *non obstante veredicto* for the plaintiff in error on the whole record, the assignment shall state the reasons presented to the trial court for the entry of such judgment, when the error alleged is to a ruling upon the report of a master or referee, the assignment shall state the exception to the report and the action of the court upon it. Such assignments of error shall form part of the transcript of the record, and be printed with it. When error is not so assigned, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded. The court, at its option, however, may notice a plain error not assigned.

5th

11. ASSIGNMENT OF ERRORS.

The plaintiff in error or appellant shall file with the clerk of the court below with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of error shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis,* whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

6th

11. ASSIGNMENT OF ERRORS.

The appellant shall file with the clerk of the District Court at or before the time of filing his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be

allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. When this is not done, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned.

RULE 12.

1st 2d 3d 4th 5th 6th 7th 8th 9th

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation, found in the record as evidence, unless [1] objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

[1] In the 6th circuit, for the words following note number, "objection was taken thereto in the court below and entered of record," substitute "the record shows that objection was taken thereto in the court below and brought to the attention of the trial judge on the submission of the cause."

RULE 13 (Two Sections).

1st 2d 3d 4th 5th —— 7th 8th 9th

SUPERSEDEAS AND COST BONDS.

1. *Supersedeas* bonds in the circuit and [1] district courts must be taken with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs, if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest [2] on the appeal; but, in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an

amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay and costs and interest [2] on the appeal.

[1] The words "circuit and" appear in the 1st and 7th circuits but are omitted in the 2d, 3d, 4th, 5th, 8th and 9th circuits.

[2] In the 7th circuit the words "costs and interest" are transposed to read "interest and costs."

6th

13. ALLOWANCE OF WRIT OF ERROR OR APPEAL.

1. An appeal from or writ of error to a District Court in the cases provided for in sections 128, 129 and 130 of the Judicial Code approved March 3, 1911, may be allowed in term time or in vacation by the Circuit Justice, wherever acting, or by any Circuit Judge acting within the circuit, or by any District Judge acting within the district where the case was heard and authorized to hold court in that district; and the proper security may be taken and the citation be signed by him and he may also grant a *supersedeas* and stay of execution or of proceedings pending such writ of error or appeal.

2. Where such writ of error is duly allowed in a criminal case the District Court in which the conviction occurred, or this court, or any judge of either court, shall have power after the citation is served, to admit the accused to bail in such amount as may be fixed.

(The provisions for "*Supersedeas* and Cost Bonds" in the 6th circuit are in rule 14 for that circuit.)

RULE 13 (Section 2).

—— —— 3d —— —— —— 7th —— 9th

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a[1] district court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such[1] district court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

1st

2. On an appeal from an interlocutory order or decree, the appellant shall, at the time of the allowance thereof, file a bond to the adverse party in such sum as the judge who allowed the appeal shall direct, to answer all costs if he shall fail to sustain his appeal.

[1] Add in 7th Circuit, "circuit or."

2d

2. On all appeals from any interlocutory order or decree, taken under the provisions of section 129 of the Act to codify, revise and amend the laws relating to the judiciary, the appellant shall, at the time of the allowance of said appeal, file with the clerk of the district court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

4th

2. On all appeals under section 129 of the Judicial Code, the appellant shall at the time of the allowance of said appeal, if required by the judge of the court below, file with the clerk of such court a bond to the opposite party in such sum as such judge shall direct, for all costs and damages, or simply for all costs, as the said judge shall determine, if he shall fail to sustain his appeal.

5th

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a circuit or district court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such circuit or district court a bond to the opposite party in such sums as such court shall direct, to answer all costs if he shall fail to sustain the appeal.

6th

See both sections of rule in 6th circuit quoted under section 1, rule 13 above.

8th

2. On all appeals from any interlocutory order or decree of a district court, or a judge thereof, granting, continuing, refusing, dissolving or refusing to dissolve an injunction or appointing a receiver, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such district court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

(The Judicial Code, section 128, Act of March 3, 1911.)

RULE 14.

1st

WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the rec-

ord, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safekeeping, transporting and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations, must be made returnable[1] not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the Supreme Court. The testimony in such a record shall embrace the *viva voce* proof in the district court, if the same, or the substance thereof, has been reduced to writing with the approval of its judge. The reasonable cost of so reducing the same to writing may be taxed as a part of the costs of the record, except so far as allowed as costs in the district court.

7. Further proof in instance causes in admiralty shall include only that which could not with diligence have been had at the trial below, or which was there rejected, or was omitted through misapprehension, provided the evidence be accompanied with a certificate of counsel showing reasonable excuse for the misapprehension. Except by order of the court first obtained, merely cumulative proofs shall not be so taken; but for this purpose the evidence of witnesses who had different duties, interests, or opportunities of observation, will not ordinarily be held cumulative in cases of collision or other maritime tort.

8. Such further proof may be taken after the appeal is allowed, in the manner provided by law for depositions *de bene esse*, or by any examiner appointed by any circuit or district judge, or selected by the parties, or upon interrogatories and commissions as provided in rule 13 of the circuit courts of this circuit, *mutatis mutandis*. It must be taken

[1] Add in 9th circuit, "at San Francisco, California."

and filed forthwith after it is obtainable, but it cannot, except by order of the court, be taken or filed within thirty days before any session at which the cause may be heard, nor thereafterwards until the cause has been postponed to the next term or session.

9. Objections to further proof shall be filed with the magistrate and returned with the evidence. Within seven days after the evidence is taken, the party so objecting may file in print a motion to suppress the same, with a copy of the objections and a brief. The other party may within seven days thereafter file in print a counter-statement and brief. The objections and counter-statement, so far as they contain matters of fact *dehors* the record, shall be verified by affidavit. The court will consider the objections in advance of the trial, or in connection therewith, as it may in each case determine, and without oral argument, and will order suppressed evidence not rightfully taken. The party taking the evidence so suppressed shall pay the costs arising therefrom, including the printing thereof.

10. Nothing herein shall exclude applications for leave to take further proof, or objections thereto, in advance of the taking thereof, or objections touching the formalities of taking it; but the latter must be brought to the attention of the court forthwith after the evidence is filed.

2d

14. WRIT OF ERROR, APPEALS, RETURN, AND RECORD.

Sections 1 to 5 the same as those of 1st circuit, except for omission of the words "circuit or" before the words "district court" in section 4.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the Supreme Court.

3d

14. WRIT OF ERROR, APPEALS, RETURNS, AND RECORD.

1. Any appeal to this court, or writ of error from this court, allowable by law, may be allowed in term time or vacation, by the Circuit Justice, or by any of the Circuit Judges within this Circuit, or by any district Judge within the district where the case to be reviewed was heard or tried, who may also take the proper security, sign the citation, and, if he deem it proper so to do, grant a *supersedeas* and stay of execution or proceedings pending such writ of error or appeal. Whenever an appeal or a writ of error to this court shall be allowed by a District Judge, or shall be issued by the clerk of a District Court, the clerk of

the District Court shall give immediate notice thereof to the clerk of this court.

2. The clerk of the court to which any writ of error may be directed, or from which any appeal may be taken, upon being paid or tendered his fees therefor, shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

3, 4, 5, same as sections 2, 3, 4, for the 1st circuit, except that it omits the words 'circuit and" before the words "district court."

6. Same as section 5 for the 1st circuit, with the addition of the following clause: "But the citation must be signed, and the bond for costs must be approved and filed, and the assignments of error submitted and filed, with the petition for the appeal or writ of error, immediately after the appeal or writ of error is allowed: *Provided, however,* that every appeal taken from an interlocutory decree, under the seventh section of the act entitled 'An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' approved March 3, 1891, and amendments to said section shall be made returnable in ten days from the allowance of the appeal and the signing of the citation."

7. The records in cases of admiralty and maritime jurisdiction shall be made up in the same manner, as nearly as practicable, as are the records in equity cases.

4th

14. WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall (except as otherwise provided by rule 23) make return of the same, by certifying under his hand and the seal of said court, in accordance with the act of Congress of February 13, 1911 (36 Stats. 901), and transmitting to the clerk of this court one of the printed transcripts of the record provided for by said act. In all cases of appeal and also in all cases of petition for revision in bankruptcy said clerk shall likewise certify, seal and transmit a copy of the printed transcript of the record to the clerk of this court.

2. In every printed transcript of the record the order of the parts thereof shall substantially follow the order in which the same were filed, entered or made, and shall contain a copy of such opinion or opinions of the trial judge as may have been filed. It shall be suitably indexed, and where any deposition or report of evidence requires more than one printed page the name of the deponent or witness shall be printed at the

top of each page. And the foregoing shall, so far as may be applicable, apply to the printed addenda to records hereinafter provided for.

3. Except in cases where counsel shall agree by written and signed stipulation,—which shall be a part of the record,—as to what portions of the record and proofs of the case in the court below, shall be printed in the transcript of the record for use in this court, the trial judge shall have the power, upon application after reasonable notice to the opposing party or his counsel, to determine what shall be included in such transcript, and his determination shall be signed by him, and made part of the record; he shall include in such signed paper, such portions of the record and of the proofs as he may deem material for the proper disposition of the questions to be decided by this court, as also such parts as are specially required by these rules. But if any party desires printed any document or part of the record or proofs directed by the trial judge to be omitted, such party may print the same under separate cover and cause it to be certified and transmitted to this court as an addendum to the record. Such printing and certification shall be primarily at the cost of the party who requires it. The cover sheet of such addendum shall contain the title of the cause and shall plainly show that it is an addendum to the transcript and shall show at whose instance it was printed.

4. Whenever it shall be necessary or proper, in the opinion of this court or of the court below, that original papers of any kind should be inspected here, this court or the court below may make such rule or order for the safekeeping, transporting and return of such original papers as to it may seem proper.

5. All appeals, writs of error and citations must be made returnable not exceeding forty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

6. The transcript of the record in cases of admiralty and maritime jurisdiction shall include the matters which, by admiralty rule 52 of the Supreme Court are required to be included therein.

7. No transcript of the record and proofs shall (unless it be specifically otherwise ordered by the trial judge) contain a copy of the petition for writ of error or petition for appeal, the order granting writ of error or appeal, the writ of error, the appeal bond, the citation, the return of service or waiver of service of citation, in lieu thereof the originals of said documents shall be certified to this court within forty days of the date of the citation (all to be returned to the court below with the mandate of this court except the citation and writ of error) and in said

transcript there shall be inserted a memorandum stating the date of the petition for writ of error or for appeal, the date of the order granting writ of error or allowing appeal, the date of the writ of error and date when copy thereof or copy of order allowing appeal is lodged in the office of the clerk of the court below for adverse parties, the date, penalty, the names of the obligors, the condition (whether for payment of costs and damages or for costs alone) of the appeal bond, the date of the citation, and the date of the service thereof or of the waiver of service thereof.

No general replication in equity shall be copied into the transcript of the record, but in lieu thereof there shall be inserted a memorandum showing the date of filing of such replication and by whom filed. When a case has by writ of error or appeal been brought to this court the second time, there shall only be copied in the record the proceedings subsequent to the former writ of error or appeal. It shall be the duty of the trial judge in determining what shall constitute said transcript of the record, to direct the omission of all matter which in his judgment is unnecessary to the presentation of the issues to be passed upon by this court and especially to prevent unnecessary duplications in such transcript. And the clerk below shall not certify any transcript of the record and proofs unless it contains either the stipulation of counsel or the determination of the trial judge mentioned in § 3 of this rule.

8. Whenever the printed transcript of the record or any addendum thereto as certified by the clerk of the court below shall contain any corrections or insertions, it shall be the duty of the party filing the printed transcript or addendum in this court to correct all the copies of the same so as to correspond with the certified transcript or addendum.

5th

14. WRITS OF ERROR, APPEALS, RETURN AND RECORD.

Sections 1 to 4 same as corresponding sections for the 1st circuit.

5. All appeals, writs of error and citations must be made returnable and the transcript filed in the clerk's office at New Orleans not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

Provided, however, that appeals taken from interlocutory decrees under the seventh section of the act entitled "An act to establish Circuit Courts of Appeal and define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, and amendments thereto, shall be made return-

able not exceeding ten days from the day of taking the same. (As amended Jan. 12, 1905.)

6. Same as section 6 for the 2d circuit.

6th

14. SUPERSEDEAS AND COST BONDS.

1. Upon the allowance of any appeal to, or writ of error from, this court (except when allowed to a party proceeding in *forma pauperis*, or in other case where, by statute, no bond is required), the court or judge allowing shall take and approve a bond with good and sufficient security that the appellant shall prosecute his writ or appeal to effect, and answer all costs if he fail to make his plea good.

2. If the appeal or writ of error is to operate as a *supersedeas*, the court or judge shall, in the allowance, order that it have such effect upon the filing of the required bond, and in such case, the bond shall be conditioned to answer all damages and costs. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, are in the custody of the court, indemnity will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

7th

14. WRITS OF ERROR, APPEALS, RETURN AND RECORD.

1. The clerk of the court, to which any writ of error may be directed, shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case necessary to the hearing in this court, under his hand and the seal of the court. The clerk may require of the appellant or plaintiff in error a written *precipe* stating in detail what the transcript shall contain, and when a *precipe* is filed shall insert a copy thereof in the transcript.

2. Same as section 2 for the 1st circuit.

3. No case will be heard until a complete record shall have been filed, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings necessary to the hearing in this court.

4. Same as section 4 for the 1st circuit.

5. All appeals, writs of error and citations must be made returnable not exceeding thirty days from the date on which the appeal is allowed, or the writ of error issued, whether the return fall in vacation or in term time, and be served before the return day. "If a party be nonresident the citation and any other writ or notice necessary in the prosecution of the appeal or writ of error may be served upon such party's counsel or attorney of record, who for such purpose may not be discharged unless another resident be designated of record in the case upon whom service may be made."

6. Same as in 1st circuit.

8th

14. WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1 and 2 same as for the 1st circuit, adding in 2 the following: "And in cases at law a complete copy of the charge of the court to the jury."

3. No case will be heard until twenty-five copies of the printed transcript of the record, containing in themselves, and not by reference, all the papers, exhibits, depositions. sketches, drawings, photographs, maps, blue-prints and other proceedings, which are necessary to the hearing in this court, printed title pages in the form prescribed in § 5 of rule 26, chronological printed indexes of each and every item of their contents specifying the pages where evidence, testimony and exhibits including those in the body of any pleading, order or bill of exceptions may be found and briefly naming or describing each exhibit in addition to its number together with a statement of the numbers, names and dates of issue of any patents, shall have been filed in this court.

4, 5 and 6, same as corresponding sections in 1st circuit except that in section 4 it omits the words "circuit and" before the words "district court."

9th

14. WRITS OF ERROR, APPEALS, RETURN AND RECORD.

1. Same as section 1 for the 1st circuit, with the insertion of the words "opinion or opinions" after the word "record."

2. In all cases brought to this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record the original writ of error and citation, or citation issued in the cause, and a certificate under seal stating in detail the cost of the record and by whom paid.

3, 4 and 5 same as corresponding sections of the 1st circuit except that in section 4, it omits the words "circuit and" before the words "district court," and in section 5 the words "at San Francisco, California" are inserted after the word "returnable." (See also rules 16, 17, 23, 34, 35 and 36 and Rules in Admiralty.)

RULE 15.

1st 2d —— —— 5th —— 7th —— 9th

15. TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony or other proceeding made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

The above is rule 16 in the 3d circuit.

3d

15. BAIL IN ERROR.

1. Where a writ of error has been allowed in a criminal case, the justice or judge who allowed the writ, or any judge of the court which entered the judgment to be reviewed, shall have power to admit the plaintiff in error to bail for his appearance in such court on the determination of the proceedings on the writ of error to abide by and obey any order that may be made therein. The bond or recognizance for such appearance shall be substantially in the following form:

United States of America, }
—— District of ——, } ss.

We [here insert name of defendant], residing at —— and [here insert the name of surety], residing at —— in the state of ——, acknowledge ourselves to be jointly and severally indebted to the United States of America in the sum of —— dollars, lawful money of the United States of America, to be levied on our goods and chattels, lands and tenements, upon this condition: That if the said ——, the defendant, upon whose application a writ of error has been allowed by the United States circuit court of appeals for the third

circuit and is now pending, shall be and appear at the district court of the United States for the —— district of —— upon the determination of the proceedings on said writ of error, and the receipt and filing of a mandate or other process or certificate showing the disposition thereof by the said court of appeals, or, within five days thereafter, to answer and obey whatever final order or judgment, except as to costs, shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void; otherwise, to remain in full force and virtue.

—— (L. S.)
—— (L. S.)
—— (L. S.)

Taken, acknowledged and subscribed, this —— day of —— A. D. 191—, in open court.

——, Clerk of District Court.

4th

15. TRANSLATIONS.

Whenever any transcript of the record transmitted to this court shall contain any documents, papers, testimony or proceedings in a foreign language, and the transcript does not also contain a translation of the said documents, papers, testimony or proceedings made under the authority of the lower court, or admitted to be correct, the transcript of the record may be returned by this court to the lower court in order that a translation may there be supplied, printed and certified to this court.

6th

In the sixth circuit no provision is made for "Translations," and rule 15 is as follows:

15. RECORDS AND RETURNS ON WRITS OF ERROR AND APPEALS.

1. All appeals, writs of error and citations must be made returnable not exceeding thirty days from the day of allowing the appeal in open court or signing the citation, whether the return fall in vacation or in term time, and must be served before the return day.

2. The clerk of the district court shall make return to any writ of error to, or appeal from, that court, by transmitting, certified under his hand and the seal of the court, a transcript of the record in the district court, prepared as directed by other provisions of this rule. He shall make such return on or before the return day, unless the time therefor be extended as otherwise provided in these rules.

3. In all appeals, not in admiralty (and save in cases under general equity rule 77), the transcript—the contents of which are to be determined pursuant to clauses (a) and (c) of general equity rule 75 (Note 1)—shall always include: (1) the statement of evidence; (2) the clerk's certificate showing what portions are included by request of each party; (3) any opinion or memorandum filed by the judge pertaining to the matter involved in the appeal; (4) the pleadings affecting the decree or order appealed from, and such order or decree; (5) all proceedings relating to the appeal and the security given thereon, together with a copy of the citation, if one there was, and the evidence of service; (6) in cases removed from the state court, the full transcript on removal; and (7) in bankruptcy, shall also contain the petition for adjudication and the order thereon. It shall omit: (1) all formal proceedings to bring into court parties who afterwards appear generally, unless such proceedings are involved in the desired review; and (2) all motions or petitions filed and all affidavits in connection therewith, and all orders made and proceedings had thereon, unless such matters are involved in the desired review. It shall carry, at the beginning of each paper, the name thereof, and the date when it was filed, omitting the title of the court and the cause and all formal indorsements (Note 2). Orders and decrees shall carry a short, descriptive title with the date and entry and the name of the judge, but without other caption (Note 3). Exhibits or documents shall not be duplicated, but a cross-reference shall be made.

4. Upon writ of error from this court, the contents of the transcript shall be determined and the transcript made up in the same manner provided by clauses (a) and (c) of general equity rule 75 and clause 3 of this rule, both applied as near as may be to an action at law. Such transcript shall contain also a copy of the bill of exceptions, the assignments of error and the writ of error.

5. The original citation with proof of service and the original writ of error shall be filed with the clerk of the court below and be by him transmitted with the transcript to the clerk of this court.

6. Whenever it shall be necessary or proper, in the opinion of the District Judge, that original papers or exhibits of any kind shall be inspected in this court upon review, he may make such rule or order as to him may seem proper for the safekeeping, transporting and return of such original papers and exhibits; and this court will receive and consider such originals in connection with the transcript.

[1] Equity Rule 75, see Equity Rules, this Appendix.
[2] e. g., "Answer. Filed February 1, 1913."
[3] e. g., "Final Decree. Entered February 1, 1913, by Judge ———."

7. The record, in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty Rule 52.

8. On motion duly made, or on its own motion, this court will order portions to be stricken from the transcript, or additions to be made thereto by supplementary return, as may appear proper.

8th

15. TRANSLATIONS.

Whenever any transcript transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony or other proceeding in a foreign language, and the transcript does not also contain a translation of such document, paper, testimony or other proceeding made under the authority of the inferior court, or admitted to be correct, the transcript shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, and if the record is to be printed in the court below it shall be reported to that court by its clerk, in order that a translation may be there supplied and inserted in the record.

RULE 16.

—— 2d —— —— 5th[1] —— 7th 8th 9th

16. DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record ["and docket the case," 9th circuit] thereof with the clerk of this court ["at San Francisco," 9th circuit] by or before the return day, whether in vacation or in term time. But for good cause shown, the justice or[2] judge[3] who signed the citation, or any judge of this court may enlarge the time[4] by or before its expiration, the order of enlargement to be filed with the clerk of this court.[5] If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree

1 In 5th circuit a fourth section is added just below.

2 In 2d circuit added "any district."

3 In 2d circuit substitute for the words "who signed the citation," these words, "within the district."

4 "Upon four days' notice served before its application on the attorney for the opposite party," 2d circuit.

5 From this note number on the balance of this section 1 is section 2 in the 4th circuit.

was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of this court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record ["and docket the case," 9th circuit] with the clerk of this court, and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.[6]

3. [Except 9th circuit following.] Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.[7]

3. [9th circuit.] Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall, if said counsel be qualified under the provisions of rule 7, be entered.

4. [In 5th circuit only.] In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction for the payment of his fees, or otherwise satisfy him in that behalf.

1st

16. DOCKETING AND DISMISSING CASES.

1. The plaintiff in error or appellant shall docket the case, and file the record thereof, on or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any circuit or district judge, may enlarge the time, the order of enlargement to be filed in this court.

2. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed whether in term time or vacation upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case, the return day of citation, and that the writ of error or appeal was duly sued out or allowed. And the plaintiff in error or appellant shall not be entitled to docket the case, or file

[6] For "at the term" substitute "in due course" in 7th circuit.

[7] The following note was added to the rule for the 8th circuit:

Note: A deposit of thirty-five dollars to secure clerk's costs is required before the record in a cause is filed and docketed.

the record, after the same shall have been docketed or dismissed under this rule, unless by the order of the court after notice to the adverse party.

But the defendant in error or appellee may, at his option, docket the case and file the record; and, if the case is docketed and the record filed by the plaintiff in error or appellant within the time prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

3. On the filing of the record, the appearance of the counsel for the party docketing the case shall be entered.

3d

Rule 16 of 1st circuit with same additions is rule 17 of 3d circuit quoted below under rule 17. Rule 16 of 3d circuit is the same as rule 15 of the other circuits above dealing with "Translations."

4th

16. DOCKETING CASES.

1, Except as otherwise provided by rule 23, it shall be the duty of the appellant, plaintiff in error, or petitioner for revision in bankruptcy to cause to be printed and suitably indexed the transcript of the record (as well as any addendum to the record required by such party) and to deliver the same to the clerk or deputy clerk of the court below for certification, sealing and transmission to this court within forty days from the date of the citation or the filing of the petition for revision; and also on or before the expiration of the said forty days to file with the clerk of this court at least twenty-four printed copies of the said transcript and addendum above-mentioned, if any. He shall also at the same time furnish to the adverse party at least three copies of the printed transcript of the record, including any addendum thereto printed at his instance. It shall also be the duty of appellant, plaintiff in error, or petitioner for revision to docket the cause in this court on or before the return day, whether in term time or vacation. In case any appellee or defendant in error shall have required an addendum to the transcript of record, it shall be the duty of such party to file in the office of the clerk of this court, on or before the said return day, at least twenty-four printed copies of such addendum as well as one additional copy thereof, which shall have been duly certified by the clerk of the court below; and such party shall at the same time furnish to the adverse party at least three copies of said printed addendum.

The time within which any of the acts in this section above mentioned are required to be done may for good cause shown be enlarged by the justice or judge who signed the citation or any judge of this court, provided the order of enlargement be made prior to the expiration of such time; such order to be filed with the clerk of this court.

2. Is that part of § 1 (first above quoted for 2d, 5th, 7th, 8th, 9th circuits) following the note number 5.

3. Is § 2 first above quoted for 2d, 5th, 7th, 8th, 9th circuits.

4. Upon the filing of the transcript of the record in any case brought up by writ of error or appeal, the appearance of counsel for the party docketing the cause shall be entered by the clerk of this court as of course.

5. Defendants in error, appellees, or respondents, are required, at the time of entering their appearance by attorney, to make a deposit of $25 for account of costs to be incurred by them in this court. This is applicable to all cases except when the United States is defendant in error or appellee.

6th

[The rule as to "docketing" in this circuit is rule 18.]

16. DEATH OF A PARTY.

1. Whenever a party to a case pending in this court shall die, the personal representative may suggest the death upon the record, filing evidence of his representative capacity, and designating counsel, and thereupon the case shall stand as revived in behalf of or against the interest of the deceased party, and the cause shall proceed as in other cases.

2. Where a party to a case pending in this court shall die and his personal representative does not, within sixty days after such death, appear under clause 1, any other party in interest may suggest such death upon the record, filing evidence of the due appointment of a personal representative, and thereupon, and without notice, the court or any judge thereof will make an order that such personal representative appear and designate counsel. In default of such appearance, within thirty days after service on such personal representative of a certified copy of such order, the adverse party, on proof of such service and without further notice, may have, from this court, an order either to revive the cause and direct that it proceed as to the interest held by the deceased party, or to dismiss the case as to such interest, as may be by the court thought proper.

3. If the death of a party is brought to the attention of this court, and proceedings are not taken under clause 1 or clause 2 sufficiently to dispose of the resulting situation, the court will, on its own motion, direct such steps to be taken as are proper to dispose of the case or expedite the hearing.

4. Whenever any party to a suit pending in a district court shall die, and because of such death and because of the absence of any personal representative of the deceased within the jurisdiction of the district court and any means of compelling the appointment of such a representative within such jurisdiction the adverse party is not able to have the case revived in the district court and to proceed with the desired review in this court, the adverse party desiring a review may proceed as if such death had not occurred, and may have *supersedeas* as in other cases, serving all required papers and notices upon such persons as, in the judgment of the district court, will be most likely to give notice to all persons interested in the estate, and as may be directed by the district court. When the record in such a case has been filed in this court, the same proceedings shall be had as specified in clauses 2 and 3, or the court will take such proceedings as may seem to it advisable to bring in the proper parties.

RULE 17.

— 2d — — 5th — — — —

DOCKET.

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every term, or adjourned term; and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

1st

17. DOCKET AND CALENDARS.

1. The clerk shall enter and number on the docket all cases consecutively, in their proper chronological order.

2. He shall print at least twenty days before the first Tuesday of October and of January, and the second Tuesday of April, a calendar of all the pending cases, arranged by districts in the following order: Maine, New Hampshire, Rhode Island, Massachusetts.

3d

In the third circuit the rule as to "Docket and Argument Lists" is rule 18, *post*. Rule 17 is similar to rule 16 in 1st circuit, *supra*. Rule 17, 3d circuit, is as follows:

17. FILING RECORDS, DOCKETING CASES AND ENTERING APPEARANCES.

1. The plaintiff in error or appellant shall file the record of the case and cause it to be docketed by the clerk of this court on or before the return day of the citation, whether in vacation or in term time; but for good cause shown the justice or judge who signed the citation, or any Circuit or District Judge, may extend the return day thereof, the order for extension to be filed with the clerk of this court.

2. If the plaintiff in error or appellant shall fail to comply with the first section of this rule the defendant in error or appellee may cause the case to be docketed without the filing of any record and have it dismissed, whether in term time or vacation, upon due proof of notice to the plaintiff in error or appellant of a motion for such dismissal, and upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case, the return day of the citation, and that the writ of error or appeal was duly sued out or allowed; and in no case shall the plaintiff in error or appellant be entitled to file the record or to have it docketed after the defendant in error or appellee shall have had the case dismissed under this section of this rule unless upon special order of the court.

3. Instead of having the case docketed for the purpose of having it dismissed under the provisions of the second section of this rule, the defendant in error or appellee, on payment of the usual fees, may file the record and cause the case to be docketed by the clerk, and if the record be filed and the case docketed, either by the plaintiff in error or appellant, within the time prescribed by the first section of this rule, or by the defendant in error or appellee under the provisions of this section, the case shall stand for argument.

4. On the filing of the record the appearance of the counsel for the party docketing the case shall be entered, and on or before the return day of the citation the counsel for the appellee or defendant in error shall also enter appearance for the appellee or defendant in error.

The provisions governing the docket in the third circuit are contained in rule 18 below.

4th

17. DOCKET.

1. The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order.

2. All cases in which copies of the printed record are delivered to the adverse party or his counsel at least twenty days before any regular term or adjourned term shall stand for argument at the term holden next after the docketing of the case.

3. The clerk before each regular term shall print a docket containing all pending cases and such docket shall be called at every term or adjourned term. If a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error, appellant or petitioner for revision, unless sufficient cause is shown for further postponement.

4. By consent of counsel in writing filed with the clerk of this court, any cases not included in section 2 of this rule may be by the clerk placed at the foot of the argument docket and may be argued at any term or adjourned term, provided the briefs on both sides are filed before the case is called.

6th

In the sixth circuit the rule as to "The Docket—Docketing—Dismissing" is rule 18.

And rule 17 is as follows in the sixth circuit:

17. PROCEEDINGS IN FORMA PAUPERIS.

1. Applications for leave to proceed in this court pursuant to the act of July 20th, 1892, as amended July 25th, 1910, must be by special motion with notice under rule 24. If made before return is filed in this court, notice shall be served upon the adverse counsel in the district court. The showing by affidavit must be sufficient to satisfy this court that the appellant is entitled to the benefit of the act.

2. If appellant was plaintiff or complainant below, he must, with his application to this court, make it appear whether or not any other person—attorney, counsel, or otherwise—is beneficially interested in the recovery sought, and, if so, that every such person is, because of his poverty, unable to pay, or give security for, the costs from which appellants seek to be excused.

7th

17. DOCKET.

The clerk shall prepare calendars of causes for the regular terms of this court, to be held on the first Tuesday of October in each year, and for each adjourned session; placing thereon in proper chronological order only cases in which the record having been printed, briefs upon both sides have been filed seven days before the beginning of the term or session.

8th

17. DOCKET.

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every term, or adjourned term, except cases from the districts of Colorado, Utah, Wyoming and New Mexico, which cases shall only be called at the September term unless counsel otherwise stipulate as provided in rule 3; and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

9th

17. DOCKET.

The clerk shall, upon payment to him by the appellant or plaintiff in error of a deposit of twenty-five dollars in each case, file the record and enter upon a docket all cases brought to and pending in the court in their proper chronological order.

RULE 18.

1st 2d —— 4th 5th —— 7th 8th 9th

18. CERTIORARI.

No *certiorari* for diminution of the record will be hereafter ["hereafter" omitted in 8th circuit] awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions ["any motion," 7th circuit] for such *certiorari* must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

3d

[Rule as to *"Certiorari"* is numbered 20 in 3d circuit.]

18. DOCKET AND ARGUMENT LISTS.

1. Upon the filing of the record in any case by the plaintiff in error or appellant and the payment by him of a deposit fee of $40.00, the clerk shall enter the case, the record of which is so filed, upon the docket of this court; such docket shall have all its cases arranged in their proper chronological order.

2. The clerk shall prepare and cause to be printed previous to the opening of each term of this court, an argument list of all cases the records of which shall have been filed with him not less than fifteen days before the opening of the term, which cases shall be put on the argument list in the chronological order of docketing the same, subject, however, to the following system of grouping: the first group shall be composed of the cases in which all the circuit judges shall be competent to sit; the second of the cases in which all the circuit judges except the youngest in commission shall be competent to sit; the third, of the cases in which all the circuit judges except the next to the youngest in commission shall be competent to sit, and the fourth, of the cases in which all the circuit judges except the oldest judge in commission shall be competent to sit.

6th

[There is no rule as to *"Certiorari,"* in 6th circuit.]

18. THE DOCKET—DOCKETING—DISMISSING.

[In the other circuits this subject matter is treated in rules 16 and 17.]

1. The clerk shall enter upon the docket in their proper chronological order all cases brought to or in this court.

2. The appellant shall docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time, and at the time of filing the record, the appellant shall deposit with the clerk the sum of thirty-five dollars as security for costs, except in cases in which the proper showing is made and an order of this court is entered thereon allowing the cause to proceed in *forma pauperis*, and except in the cases where, by statute, advance payment of costs is not required. For good cause shown, the justice or judge who signed the citation, or any judge of this court, may enlarge the time for return at or before its expiration, the order of enlargement to be returned with the record and filed with the clerk of

this court. If the appellant fail to comply with this rule, the appellee may have the cause docketed and dismissed, upon producing a certificate from the clerk of the court wherein the said judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. In no case shall the appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

3. The appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the appellant within the period of time above limited and prescribed by this rule, or by the appellee at any time thereafter, the case shall stand for argument.

4. The appearance of the counsel docketing the case shall thereupon be entered upon the docket.

5. All subsequent papers filed, orders made and proceedings had, shall be noted upon the docket.

6. Whenever counsel for appellant and appellee shall, in vacation, sign and file with the clerk an agreement in writing directing the case to be dismissed and specifying the terms as costs, on which terms it is to be dismissed, and shall pay to the clerk any fees due, he shall enter the case on his docket as dismissed and give to either party requesting it a copy of the agreement filed; but no mandate or other process on such dismissal shall be issued without the order of the court.

RULE 19.

1st 2d —— 4th 5th —— 7th 8th 9th

19. DEATH OF A PARTY.

[This subject matter is under rule 21 in the 3d circuit and rule 16 in the 6th circuit.]

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and, if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error ["or

appellee," 4th circuit], shall be entitled to have the writ of error or appeal dismissed, and, if the party so moving shall be plaintiff in error ["or appellant," 4th circuit], he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous: *Provided, however,* That a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are ["shall have been," 7th circuit] taken by the opposite party within that time to compel their appearance, the case ["writ of error or appeal," 7th circuit] shall abate.

3. When either party to a suit in a circuit or[1] district court of the United States shall desire to prosecute a writ of error or appeal to this court from any final judgment or decree rendered in the circuit or[1] district court, and, at the time of suing out such writ of error or appeal, the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some state or territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And, within thirty days after the filing of the record in this court the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some state or territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the state or territory or district in which such representative resides; and, upon such suggestion he may, on motion, obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and on hearing have the judgment or decree reversed, if the same be erroneous: *Provided, however,* that a proper citation, reciting the substance of such order, shall be served upon such representative either personally, or by being

1 "Circuit or" omitted in 8th and 9th circuits.

left at his residence, at least thirty days before the expiration of such ninety days: *Provided, also,* that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: And *provided, also,* that the said representative may at any time before or after said suggestion come in and be made a party to the suit and thereupon the case ["suit," 5th circuit] shall proceed, and be heard and determined as in other cases. [A note in 7th circuit reads, "See § 9, Act. Mch. 3, 1875, Sup. Rev. Stats., p. 177."]

3d

In the third circuit the above is rule 21, and rule 19 is as follows:

19. ARGUMENTS, CONTINUANCES, AND DISMISSALS.

[See rule 25 in other circuits, and rule 23 in 6th circuit.]

1. The cases in the argument list shall be called for argument at each term, or adjourned term, and cases shall be argued on call unless the court shall for good cause otherwise order.

2. If the defendant in error or appellee fails to appear when his case is called for argument, the court may proceed to hear the argument on the part of the plaintiff in error or appellant and to give judgment according to the right of the case.

3. For good cause shown the court may order the continuance of any case for the term.

4. When a case is reached in the regular call, and there is no appearance for either party, it may be dismissed at the cost of the plaintiff in error or appellant.

5. Where no counsel appears for the plaintiff in error or appellant, and no brief has been filed for him, the defendant in error or appellee may have the writ of error or appeal dismissed at the cost of the defaulting party.

6. If a case is called for argument at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant unless a sufficient cause is shown for further postponement.

7. Whenever the plaintiff and defendant in a writ of error pending in the court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on

which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

8. Cases may also be dismissed in accordance with the second section of rule 17, the first section of rule 23, and the fourth section of rule 24 of this court.

9. Except as in the preceding sections of this rule it is otherwise provided, no motion to dismiss a writ of error or an appeal will be heard unless previous notice of the motion has been given to the plaintiff in error or appellant or his counsel.

6th

19. PRINTING RECORDS.

[See rule 23 in other circuits.]

1. In cases where the record is printed by the appellant under act of February 13, 1911, he shall file with the clerk twenty-five printed copies thereof within the time as limited or extended for making return to writ of error or appeal. The clerk shall examine the printed records so offered to ascertain whether the transcript complies with rule 15, and also, whether the printed records comply with the statute and are properly indexed. If, in his judgment, they are insufficient in any particular, he shall bring the matter to the attention of the court, which will thereupon make such order as to it may seem proper for corrected or supplementary return and printed records. As soon as the printed records are approved as filed or perfected as ordered, the clerk shall deliver one copy to each counsel or group of counsel representing a separate interest, and shall continue such distribution as counsel subsequently appear.

2. The clerk shall, from time to time and as directed by the senior circuit judge, receive proposals for printing such records as are to be printed by the clerk, which proposals shall be submitted to such judge, who will, in his discretion, award such printing to the most satisfactory bidder; and the same shall be done, during the period of such award, by the person to whom it is made.

3. In cases where appellant is not proceeding under such statute, the clerk shall at once, upon the docketing of the case, cause an estimate to be made of the cost of printing the record, including his supervising fee as provided in the table of costs following rule 27, and notify counsel for appellant of the estimated amount, which shall be paid to the

clerk within ten days after such notice. If not so paid, the case may be dismissed upon motion or by the court upon its own motion. Supplemental estimates and payments thereof shall be made, if necessary; any excess payment shall be refunded, when the printing is finished. When the record was printed upon a former review of the same case, and enough old records to be reasonably sufficient for use upon the hearing are on file or available, the use of such old records, in lieu of printing, will be permitted, upon the order of the presiding judge, and to the extent specified in such order.

4. At once, upon the payment of such estimate, the clerk shall cause twenty-five copies of the record to be printed forthwith, shall file the same and shall distribute three copies of the same to counsel for each separate adverse interest then or thereafter appearing. Before printing, he shall examine the transcript to ascertain whether it complies with rule 15, and if, in his judgment, it omits anything required by that rule, he shall submit the matter to the court, which will make such order as to it may seem proper regarding a corrected or supplementary return; and the printing shall be delayed until the filing of any further return so ordered. In printing, the clerk shall omit any matters contained in the transcript which, by rule 15, are required to be omitted. If the appellant shall in writing and before the record is printed, request the clerk so to do, he shall print fifty copies instead of twenty-five. If the appellee shall request such additional copies to be printed, the clerk shall comply with such request, if the appellee, upon demand, advances to him the estimated cost of printing the additional twenty-five copies. If, later, a review in the Supreme Court is sought, the clerk shall deliver such twenty-five copies to the party seeking a review; but if such additional records are wanted by the party who did not pay for the printing thereof, the clerk shall require payment to him of the actual cost of such additional printing and shall refund the same to the party who had paid therefor.

5. Where the record is printed by the appellant, he shall file therewith proof by affidavit of the actual cost of such printing, including the amounts paid to the clerk in the district court for the transcript. The amounts paid to the clerk of the district court for the manuscript transcript and to the clerk of this court for printing and for his fees in connection therewith, or the amounts so shown to have been paid below by appellant (not exceeding, for printing, the amount which printing and supervision by the clerk of this court would have cost) shall form a part of the costs of the cause in this court and shall be taxed against the party against whom the costs are given and shall be inserted in the mandate or other proper process.

RULE 20.

1st 2d —— —— 5th —— —— —— 9th

20. DISMISSING CASES.

["DISMISSING CASES BY AGREEMENT," 1st Circuit.]

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

3d

Same as rule 18, *"Certiorari,"* for all other circuits except 6th.

4th

In the fourth circuit the following is added to the above: "No attorney's docket fee shall be taxed in a case dismissed under this rule."

6th

20. BRIEFS.

[See rule 24 in other circuits.]

1. Counsel for appellant, within twenty-five days after the filing of the printed copies of the record, shall file with the clerk twenty printed copies of a brief.

2. This brief shall contain, in order here stated:

(1) A concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised;

(2) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record, and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. Within thirty days after service of appellant's brief, counsel for appellee shall file with the clerk twenty printed copies of his brief, which shall be of like character to that required of appellant, except that no statement of the case shall be required.

4. Subsequent briefs may be filed by either party; by the appellant, not less than twenty days, and by the appellee, not less than ten days, before the case is put on the call for argument. Later briefs will not be received by the clerk or by the court, without permission of the court or one of the judges thereof.

5. Every brief of more than twenty pages shall contain on its front fly leaves, a subject index with page references, the subject index to be supplemented by a list of all cases referred to alphabetically arranged together with references to the pages of the brief where the cases are cited.

6. At or before the time of filing any brief, two copies thereof shall be served upon each adverse counsel who has appeared in this court, and if there has been no appearance here for appellee, then upon his counsel in the court below; and the clerk shall require proof or acknowledgment of such services to be filed with the brief.

7. When an appellant is in default under clause 1 of this rule, the case may be dismissed on motion, or further time may be granted; when an appellee is in default under clause 3 of this rule, the appellant may bring such default to the attention of the court by a motion for a summary judgment of reversal, and thereupon the court will entertain such motion, or grant further time, as may seem proper; at the hearing a party who has not filed a brief, as required by this rule, will not be heard orally, unless the court shall so request.

7th

20. DISMISSING CASES.

Whenever the parties to a writ of error or an appeal shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, in respect to costs, and shall pay to the clerk any fees that may be due to him, the clerk shall enter the case dismissed and shall give to either party requesting it a copy of the agreement filed, but no mandate or other process shall issue without an order of the court.

8th

20. DISMISSING CASES.

Whenever the plaintiff and defendant in a writ of error pending in this court or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that

may be due to him, it shall be the duty of the clerk seasonably to present such agreement to the court for its consideration and determination.

RULE 21.

—— 2d —— 4th 5th —— 7th 8th 9th

21. MOTIONS.

1. [Except in 9th, which follows 3 below.] All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One ["half," 2d, 7th and 9th circuits] hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice ["as above," 9th circuit] has been given to the adverse party, or the counsel or attorney of such party.

1 in the 9th circuit is as follows:

1. All motions to the court shall be reduced to writing* shall contain a brief statement of the facts and objects of the motion and shall be served upon opposing counsel at least five days before the day noticed for the hearing.

*When typewritten, an original and three copies must be filed.

1st

21. MOTIONS.

1. The motion day shall be the first Tuesday of every stated session of the court, and any other Tuesday while the court shall remain in session.

2. Same as subdivision 1 in the other circuits above.

3. All motions to dismiss writs of error or appeals (except motions to docket and dismiss under rule 16) or to advance cases, or for a writ of *certiorari*, and other special motions, shall be printed, and be accompanied by printed briefs.

4. No motion to dismiss except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party or his counsel.

5. Any motion, of which counsel shall have given notice to the clerk in advance, shall be entered on the clerk's list in the order in which he receives notice thereof, and shall have priority in that order before other motions, unless otherwise specially ordered by the court.

6. Half an hour on each side shall be allowed to the argument of a motion and no more, without special leave of the court granted before the argument begins.

3d

Rule 21 in the 3d circuit, "Death of a Party," is the same as rule 19 for the 1st circuit, except that it omits the words "circuit or" before the words "district court" wherever they occur in § 3. The rule as to "Motions" is rule 22, 3d circuit.

6th

21. FORM OF PLEADINGS, RECORDS AND BRIEFS.

1. Records printed by the clerk shall be of a uniform size, printed in small pica type, 24 pica ems to a line, 48 lines to a page, solid, with index and suitable cover, containing the title of the court and cause, the court from which the case is brought to this court and the number of the case; size of pages to be $9\frac{1}{2}$x$6\frac{1}{2}$ inches, except that in patent cases the size of the page will be $10\frac{3}{4}$x$7\frac{5}{8}$ inches,—that is to say, large enough to bind in copies of patent office drawings and specifications without folding.

The type shall be of a clear, strong face, substantially equivalent to that in which this rule is printed and the paper shall be wholly unglazed. Each page shall carry as a running head in addition to the 48 lines, the name of the paper or of the witness testifying, as found on that page. Each pleading, order, exhibit or other paper shall be separated from the preceding matter by a 2-inch space and shall be headed by its title, in black-faced capitals, and its filing date (e. g., "Answer—Filed February 15th, 1913"). The full title of the court and cause below shall be given on the title page; elsewhere, both shall be omitted.

2. Printed arguments and briefs of attorneys shall conform as far as practicable to the size and style of the printed record but shall contain about 36 lines to the page and be leaded with at least two-point leads. Provisions governing motions and hearings thereon in the 6th circuit are contained in rule 24 for that circuit.

RULE 22.

—— 2d —— —— 5th —— —— 8th 9th

22. PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called ["has been called for trial" 5th circuit] the defendant may have the plaintiff[1] called and the writ of error or appeal dismissed.

2. Where the defendant[2] fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff,[1] and to give judgment according to the right of the case.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.[1]

1 In 8th circuit, reads "plaintiff in error or appellant."
2 In 8th circuit, reads "defendant in error or appellee."

6th

22. CALL AND ORDER OF THE CALENDAR.

1. On the first Tuesday of October and of January, and on the second Tuesday of April, the court, except as may, from time to time, be otherwise ordered, will commence calling cases for argument in the order in which they stand on the calendar, and proceed from day to day during the session in the same order; but no case from the district of Massachusetts shall be called before the second Tuesday of the session.

2. Same as subdivision 1 of the other circuits above.

3. Same as subdivision 2 of the other circuits above.

4. Same as subdivision 3 of the other circuits above except substitute "calendar" for "docket," "may" for "shall" before "be dismissed."

5. If either of the parties is ready when the case is called, the same may be heard; and, if neither party is ready, the case may be dismissed, or be postponed to the next session, as the court may order.

6. If a case is called for hearing at two stated sessions successively and, on the call at the second session, neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

7. The court will not hear arguments on Mondays or Saturdays, unless for special cause it shall so order.

8. Five cases are liable to be called on the coming in of the court on each day.

9. Revenue and other cases which concern the United States, and which also involve or affect some matter of general public interest, and criminal cases, and cases once adjudicated by this court on their merits and again brought up by writ of error or appeal, may be advanced by order of the court.

10. Two or more cases involving the same question may, by leave of the court, be heard together, to be argued as one case or more, as the court may order.

11. No agreement of counsel to pass or postpone a case, or to substitute one case for another, shall become effective except on leave.

3d

22. MOTIONS.

Same as §§ 1 and 2 of rule 21 above for the 2d circuit, except one hour allowed for argument.

Provisions governing the procedure in the 3d circuit when the parties fail to appear or are not ready are contained in §§ 2–6 of rule 19 for that circuit, above.

4th

22. PARTIES NOT READY.

1. When a case is called for hearing, and no counsel appears and no brief has been filed for the plaintiff in error or appellant, the defendant in error or appellee may have the adverse party called and the writ of error or appeal dismissed.

2. Where the defendant in error or appellee fails to appear when the case is called for hearing, the court may proceed to hear argument on the part of the plaintiff in error or appellant, and to give judgment according to the right of the case.

3. When a case is reached in the regular call of the docket and no counsel appears for either party and no submission of the case is asked, the case may be dismissed at the cost of the plaintiff in error or appellant.

6th

22. THE HEARING CALENDAR.

1. Upon the expiration of the time limited for filing briefs, the case shall stand for hearing when reached.

2. A calendar, containing all cases docketed and not heard, shall be printed by the clerk for the October, January and April sessions. The cases on the calendar which stand for hearing under clause 1 will be called for argument in their order (as far as practicable) on the calendar, except as special advancements may have been made.

3. By leave of court and on motion of either party (1) cases entitled by statute to precedence, (2) criminal cases, (3) appeals, writs of error or petitions to revise in bankruptcy matters, and (4) cases which are for the second time in this court,—may be advanced and set for a designated session. The court may also, on its own motion or for good cause shown on motion of either party, advance any case to be heard at any session, though the time permitted under the rules for filing briefs may not have expired at the day set for hearing.

4. Not more than three cases will be heard on one day (counting, however, as one case, two or more which are heard together). The call for the next day shall, at the adjournment of court, be exhibited in the clerk's office. Counsel choosing to rely on the judgment of the clerk as to the probable time of hearing any case must do so at their own risk.

5. When the case is called, if either party is ready, the case will be heard. If there is no appearance for either party, the case will be dismissed. If the appellant does not appear by counsel or by printed brief but the appellee does appear, the case will be dismissed. If the appellant appears and the appellee does not, the court will hear the appellant.

6. By agreement of counsel in open court or by stipulation filed in the clerk's office, hearing may be continued once to any later session during the term or from the last session of one term to the first session of the next term, but not to a later day during the same session. Subsequent continuances can be made only by the court and will be only for reasons satisfactory to the court; and engagement of counsel in other courts will not be considered good cause.

7. Two or more cases, involving the same question, may, by order of the court, be heard together, but they must be argued as one cause.

7th

22. PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial the other party may have the writ of error or appeal dismissed.

2. If the appellee or defendant in error fails to appear when the case is called, the court may proceed to hear argument on the part of the plaintiff in error or appellant and to give judgment according to the right of the case.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, and no brief on file for the appellant or plaintiff in error, the case shall be dismissed at the cost of the appellant or plaintiff in error.

RULE 23.

1st —— —— —— —— —— —— —— ——

23. PRINTING RECORDS.

1. In all cases, the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when the case is reached at the regular call of the docket, the case may be dismissed.

3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed under the clerk's supervision, for the use of the court and of counsel.

4. The clerk shall take to the printer the original transcript on file, but shall cause copies to be made for the printer of such original papers sent up under rule 14, or other original papers, as are necessary to be printed.

5. The clerk shall supervise the printing, and see that the printed copies are properly indexed; and he shall distribute printed copies to the judges and the reporter, from time to time, as required, and three copies to the counsel for each party. An additional number of copies may be printed at the request of either party for his own use and at his own expense, or by order of the court.

6. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record.

7. The clerk may receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

8. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it.

If the actual cost and clerk's fee shall exceed the estimate, the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

9. In case of reversal, affirmance, or dismissal, with costs, the costs of printing the record and the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

[See order of the supreme court establishing a table of fees for the circuit courts of appeals. This table appears below, 6th circuit, rule 27, subdivision 6.]

2d

23. PRINTING RECORDS.

In cases which fall within the provisions of the Act of February 13, 1911 (36 Stats. 901), the plaintiff in error or appellant will print the record and serve copies thereof in accordance with the provisions of said Act. In other cases on the filing of the transcript, the clerk shall forthwith cause fifteen copies of the same to be printed, and shall furnish three copies thereof to each party, at least thirty days before the argument, and shall file nine copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. The clerk shall be entitled to demand of the appellant, or plaintiff in error, the cost of printing the record, before ordering the same to be done. If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

3d

23. PRINTING AND DISTRIBUTING RECORDS.

1. It shall be the duty of the clerk, immediately after the record of any case shall have been filed with him and docketed and the deposit fee of forty dollars shall have been paid, to notify counsel for all parties that he will print only the parts of the record mentioned in the second section of this rule, specifying what those parts shall be, and to notify the counsel for plaintiff in error or appellant of his estimate of the cost of printing such parts of the record and of his fee for preparing the parts for the printer, indexing the same and supervising the

printing thereof. He shall print no other parts of the record unless, within ten days after such notice, he receives from some one or more of the counsel a written certificate that in his or their judgment other specified parts thereof should be printed in order to enable this court properly to decide the questions raised, in which event the parts so certified as necessary shall also be printed. The court may, in its discretion, direct the printing of other parts of the record, and, in lieu of printing patents or other exhibits, separate printed copies thereof, not less than ten in number, may be filed with the clerk. If other parts of the record than those specified in his notice shall be required to be printed by any of the counsel, or by this court, the clerk shall immediately notify the counsel for the plaintiff in error or appellant of his estimate of the additional cost of preparing, printing and indexing such other parts. The plaintiff in error or appellant shall pay to the clerk, within ten days after notice of any estimate, the amount thereof, in default of which the writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion.

2. By writing filed either with the clerk of this court, or with the clerk of the court below, the plaintiff in error or the appellant may waive the provisions of the act of Congress approved February 12, 1911; and if the act be waived the printing, indexing, supervising and distributing, shall be done by the clerk of this court as heretofore under the provisions of rule 23; and the clerk shall then be entitled to charge the supervising fee of twenty-five cents per printed page, as provided by rule 29. When the record is printed below, the parties and the clerk of the District Court, and (when record is printed in the Court of Appeals) the clerk of this court, shall be careful to avoid as far as possible the duplication of material in order to reduce the costs and fees attendant upon the printing the record.

3. Unless additional parts of the record shall be required to be printed under the provisions of the first section of this rule, the clerk shall print, for the use of the court, only the following parts thereof:

In writs of error—

(a) The docket entries.

(b) The pleadings on which the case was heard and determined.

(c) The bill of exceptions.

(d) The motion and reasons for judgment *non obstante veredicto*, if any.

(e) The opinion of the court below, if any.

(f) The charge to the jury, if any.

(g) The verdict of the jury, if any.

(h) The judgment entered.

(i) The assignments of error.

In appeal—

(a) The docketing entries.

(b) The pleadings on which the case was held and determined.

(c) The evidence, if any, on which it was heard and determined.

(d) A report of the examiner, master, auditor, referee, or other officer who first decided the case, if any.

(e) The exceptions to that report, if any.

(f) The opinion of the court, if any.

(g) The judgment or decree entered.

(h) The assignments of error.

In bankruptcy and other cases not being strictly within either of the above classes, the printed record shall conform as nearly as may be practicable to the record in appeals.

4. The clerk shall cause twenty-five copies of the record to be printed, and three copies thereof to be furnished to the counsel of the plaintiff in error or appellant, and also three copies to each of the counsel, who shall have entered appearance for any of the other parties, and the remaining copies to be filed in his office, all if possible, within thirty days after the payment to him of the amount of his estimate made under the provisions of the first section of this rule.

5. The clerk shall supervise the printing of the record, have it properly indexed and distribute printed copies thereof to the judges of the court from time to time as required.

6. If the actual cost of printing the record and the clerk's fee of twenty-five cents per page for preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying the same, but if they shall exceed the clerk's estimate, the amount of such excess shall be paid to the clerk before he shall file the printed copies of the record or deliver any of them to the parties.

7. In case of reversal, affirmance, or dismissal, with costs, the actual cost paid for printing the record by the party in whose favor costs are awarded, and the clerk's fee for supervising the printing, etc., where such fee is paid by the parties in whose favor costs are awarded, shall be taxed against the party against whom costs are given and shall be inserted in the body of the mandate or other proper process.

8. Each printed record shall show by a note or memorandum, the time when each pleading or document was filed, and shall contain at the tops of its pages the running titles of its contents.

9. In any case where the record, or any part thereof, has been printed in the court below, the same may be embodied in and used as the printed record of this court; provided, the manner and style of printing shall correspond to the requirements of the several sections of this rule for printing done under the supervision of the clerk of this court; but the plaintiff in error or appellant shall pay to the clerk of this court not only the deposit fee of forty dollars on filing the record and having it docketed, but also the fee prescribed by rule 29 for preparing the record for the printer, indexing the same, supervising the printing and distributing the copies thereof.

10. The clerk shall on or before the conclusion of each case, collect and file for preservation in this court three copies of the printed record and of each brief, printed motion and argument submitted in such case, and shall immediately after the mandate in any case shall have been sent down to the lower court, notify the defeated party in this court that unless he removes the remaining copies of the record and brief within ten days after notice so to do, the same will be destroyed.

4th

23. PRINTING RECORDS BY CONSENT.

This rule shall apply only to cases in which counsel for all parties to any cause pending in this court, or about to be brought into this court, shall by stipulation, in writing, filed with the clerk of the court below, agree to be governed by the terms hereof.

1. The transcript may be made and the record printed as has been heretofore the practice of this court, and the same shall, subject to the provisions §§ 3, 6, and 7 of rule 14, be made up by the clerk of the court below and transmitted to this court under his hand and seal as heretofore.

2. All records in such cases shall be printed under the supervision of the clerk of this court by such printer and at such rate as this court may designate. In such cases, upon the payment of the estimated cost of printing, together with the supervising and other fees established by law (which amount shall be deposited with the clerk within ten days after notice thereof), the clerk shall cause to be printed thirty-five copies of the record, twenty-five copies of which shall be filed for the use of the court, three copies furnished to the adverse party, and the remaining copies to be delivered to the appellant, plaintiff in error or petitioner.

3. The parties may stipulate in writing that parts only of the transcript of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record.

4. If the record shall not have been printed when the case is reached on the regular call of the docket, the case may be dismissed.

5. In case of reversal, affirmance, or dismissal, with costs, the amount paid for the printing of the record and the clerk's fees for supervising the same shall be taxed against the party against whom costs are given.

6. In cases brought here under this rule it shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time but for good cause shown the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule unless by order of the court.

7. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

8. Upon the filing of the transcript of a record brought up by a writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered as of course.

5th

23. PRINTING RECORDS.

1. The clerk shall, upon the docketing of a case, forthwith cause an estimate to be made of the cost of printing the record and of his fee for preparing it for the printer and supervising the printing; and shall notify the party docketing the case of the amount of the estimate. If

he shall not pay it within fifteen days in ordinary cases, and within three days in preference cases, after the date of such notice, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the records shall not have been printed when a case is reached for hearing, the case may be dismissed at the discretion of the court. (As amended Jan. 12, 1905.)

2. The clerk shall cause the record in all cases to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to the counsel of each party whose appearance shall have been entered, three copies of the printed record, taking a receipt therefor, and the parties may, by written stipulation filed prior to the printing of the record, agree that only parts of the record shall be printed, and the same may be heard only on the part so printed, but the court may direct the printing of other parts of the record.

3. The clerk shall not take to the printer the original transcript on file, but shall cause copies to be made for the printer of such original papers sent up under rule 14, or other original papers, as are necessary to be printed.

4. The clerk shall cause at least twenty-five copies of the record to be printed, and may print a larger number on the request of either party on payment of the amount necessary for the printing of such extra copies.

5. The clerk shall supervise the printing and see that the printed record is properly indexed. There shall be omitted from the printed transcripts the following:

(1) Commissions to take testimony, and the formal captions to all depositions, and the certificates of commissioners as to the taking of the depositions, except in cases where objections have been made to the depositions on account of defects in caption or certificate.

(2) All process in the nature of subpoenas, citations, summons and subpoenas in chancery, unless from the assignment of errors it appears that some issue is raised which makes it necessary for the court to inspect such writs, and then only such as are involved.

In every transcript wherein any pleading, exhibit or other paper appears at more than one place, such pleading, exhibit or other paper shall be printed at the place it first appears in said transcript, and not thereafter; but the omission shall be indicated by apt notations and references to the pages of the printed record where it appears.

The clerk shall distribute the printed copies to the judges of the court and to the reporter from time to time, as required. If the cost of printing the record, together with the clerk's fee for supervising the same,

shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the clerk's estimate, the amount of such excess shall be paid to the clerk before he shall deliver or file the printed record or any copies thereof. (As amended and promulgated Dec. 8, 1905.)

6. In case of reversal, affirmance or dismissal with costs, the amount of the costs of the printing of the record and of the clerk's fee for supervising the same shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

7. The clerk shall receive from either party, and use as parts of the printed record so far as the same may be of proper size and type, any portions which may have been printed in any other court, and also printed copies of patents and exhibits, allowing the party furnishing the same such sums therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

8. When the transcript presented to the clerk for docketing shows that the plaintiff in error or appellant has been found by the District Court, or the judge thereof, to be a poor person within the purview and meaning of the act of Congress, approved June 25th, 1910, entitled "An Act to amend Section one, chapter two hundred and nine of the United States Statutes at Large, volume twenty-seven, entitled 'An act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court,' and to provide for the prosecution of writs of error and appeals *in forma pauperis,* and for other purposes" (see 36 Statutes at Large, part 1, page 866); and as such poor person, has been authorized by said court or judge to prosecute appellate proceedings under said act of Congress, the clerk will file the transcript and docket the case without prepayment of fees or costs or for the printing of the record, and without requiring security therefor; and to this extent paragraph 4, rule 16 is amended, and rule 24 is so far amended as to dispense with printed briefs *in forma pauperis* cases. (Promulgated Dec. 3, 1914.)

6th

23. ORAL ARGUMENTS.

1. Cases will not be taken upon briefs without oral argument, except by permission of the court on special application made before the case is reached.

2. The appellant shall be entitled to open and to conclude. Cross-appeals or cross writs of error shall be argued together as one case, and the plaintiff below shall be considered as appellant under this rule.

3. Two counsel, and no more (unless by special permission), may be heard for each party; but where no brief is filed and no counsel is heard for one party, only one counsel will be heard for the adverse party.

4. One hour and one half on each side will be allowed for argument, and no more, unless by leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion, provided that a fair opening of the case is made by the appellant.

7th

23. PRINTING THE RECORD.

1. In all cases the plaintiff in error or appellant on docketing a case and filing the record shall enter into an undertaking to the clerk with surety to be approved by the clerk for the payment of all costs which shall be incurred in the cause, shall deposit with the clerk twenty-five dollars to be applied to the payment of costs and fees, and from time to time when necessary shall, on the demand of the clerk, make further deposits for that use.

2. The clerk, upon the docketing of a case, shall forthwith cause an estimate to be made of the cost of printing the record and of his fees for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error, or appellant, of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid, the writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion.

3. The clerk shall cause the record in each case to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to each of the respective parties at least three copies of the printed record, taking a receipt therefor. The parties may, by written stipulation filed with or prior to the filing of the record, agree that only parts of the record shall be printed, and the case will be heard on the parts so printed only, unless the court shall direct the printing of other parts.

4. The clerk shall cause at least twenty-five copies of the record to be printed and may print a larger number on the request of either party on the payment of the amount necessary for the printing of such extra copies.

5. The clerk shall supervise the printing and see that the printed record is indexed properly, and in a manner to indicate briefly the character of each document and exhibit referred to. He shall distribute the printed copies to the judges of the court from time to time as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before he shall deliver or file the printed record or copies thereof.

6. In case of reversal, affirmance or dismissal with costs, the amount of the cost of the printing of the record and of the clerk's fee for supervising the same shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other process.

7. Upon the clerk's producing satisfactory evidence by affidavit, or by the acknowledgment of the parties or their sureties or attorneys, of having served a copy of the bill of fees due from them respectively in this court on such parties, their sureties or attorneys, an attachment shall issue against such parties or their sureties, respectively, to compel the payment of said fees.

8. The clerk shall adopt a uniform size for the printing of all records, shall have them printed in small pica type, on clear white paper, with a margin of not less than an inch and a half, shall show by note or memorandum on the margin the time when each pleading or document was filed, and at the top of the pages shall insert running titles of their contents.

9. The briefs of attorneys shall be printed and shall conform as nearly as practicable to the size of the printed record.

10. The clerk shall, on or before the conclusion of each case, collect and file or otherwise preserve together one copy of the printed record and of each brief, printed motion and argument submitted therein.

11. In any case where the record shall have been printed in the court below, in substantial conformity to these rules, presiding judge may, on the application of the plaintiff in error or appellant order that such printed record be used in place of the printing hereinbefore provided for. But the clerk shall prepare and cause to be printed and attached to such record an index, and shall be paid the same fees for the indexing and supervising thereof as if printed under his supervision.

12. The clerk of this court shall obtain sealed proposals for the printing hereinbefore provided for, which proposals shall be submitted to the senior circuit judge of the court, who may award such printing to the lowest and best bidder, and all such printing shall be done by the person

to whom the same is so awarded, except in emergencies when printing may be done by another at the same or less price. And when a case shall be heard upon the record printed below, the costs for printing shall be taxed on the basis of actual cost not exceeding the rate of the accepted bid.

8th

23. PRINTING RECORDS.

1. In cases brought to this court in which the plaintiff in error or appellant elects to waive the printing of the record under the provisions of the act of Congress, entitled "An Act to Diminish the Expense of Proceedings on Appeal and Writ of Error or of *Certiorari*," approved February 13, 1911, and file a typewritten or manuscript transcript of the record in this court, such plaintiff in error or appellant may within twenty days from and after the date of the filing and docketing of the record in this court, serve on the adverse party a copy of a statement of the parts of the record which he thinks necessary for the consideration of the errors assigned, and file the same, with proof of service thereof, with the clerk of this court; the adverse party, within twenty days thereafter, may designate in writing and file with the clerk additional parts of the record which he thinks material, and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record in determining the questions raised by the errors assigned. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

2. On the filing of the transcript in every such case the clerk shall cause thirty copies of the same, or the parts thereof designated under this rule, to be printed, and such additional number of copies as counsel for either of the parties may direct, and shall furnish three copies of the record so printed to each party at least sixty days before the argument.

3. In cases brought to this court in which the record has been printed and used upon the hearing in the court below, and which substantially conform to the printed records in this court, the plaintiff in error or appellant upon application to and by leave of this court, may furnish to the

clerk twenty-five copies of such record, used on the hearing in the court below, to be used in the preparation of the printed record in this court; and the clerk's fee for preparing the record for the printer, indexing same, supervising the printing and distributing the copies, shall be computed as if said record so furnished had been printed under his supervision.

4. The clerk shall be entitled to demand of the plaintiff in error or appellant the cost of printing the record before ordering the same to be done.

5. If the record shall not have been printed when the case is reached for argument, for failure of the party to advance the cost of printing, the case may be dismissed.

6. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

7. In any cause brought to this court, in which the record has been printed, in which a writ of *certiorari* shall be granted under the provisions of rule 18 of this court, the return to each writ of *certiorari* shall be printed in the same manner as the record was.

8. If in any cause in which the record or a portion thereof has been printed it shall be made to appear to this court that the printed transcript does not substantially conform to the requirements of the rules of this court, it may be rejected and stricken from the files and such order relative thereto may be entered as the court shall deem proper.

9th

23. PRINTING RECORDS.

1. All records excepting in cases prosecuted under Act Feb. 13, 1911, shall be printed under the supervision of the clerk of this court, and upon the docketing of the cause, he shall cause an estimate to be made of the expense of printing the record, and his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case of the amount of the estimate. If the amount so estimated is not promptly paid over to the clerk, and for want of such payment the record shall not have been printed when a case is reached for argument, the case shall be dismissed.

2. Upon payment of the amount estimated by the clerk, eighty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

3. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to

be made for the printer of such original papers sent up under rule 14, § 4, as are necessary to be printed; and the whole of the record in cases of original jurisdiction.

4. In all cases, excepting those prosecuted under said act of Congress, the clerk of this court shall prepare the record for the printer, index the same, supervise the printing and distribute the printed copies to the judges and the reporter, and one or more printed copies to the counsel for the respective parties.

5. In cases prosecuted under said act of Congress in which it is necessary to print records or other matter under the supervision of the clerk of this court, the clerk shall prepare such records or other matter for the printer, index the same, supervise the printing and distribute the printed copies to the judges and the reporter and one or more printed copies to the counsel for the respective parties.

6. If the expense of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying same. If the expense is greater than the estimate the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver copies to the parties or their counsel.

7. In case of reversal, affirmance or dismissal, with costs, the amount paid for printing the record and of the clerk's fee shall be taxed against the party against whom costs are given.

8. The plaintiff in error or appellant may, upon filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within ten days thereafter, may designate, in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, or if such parts be distinctly designated by stipulation of counsel for the respective parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed such order as to costs may be made as the court shall think proper.

All statements and stipulations filed hereunder shall distinctly and accurately refer to the pages of the original certified record as well as the documents to be printed or omitted.

9. At the time of filing the record and docketing the cause, counsel for the plaintiff in error or appellant in patent cases may furnish the clerk with copies of patent office drawings and specifications to be used as inserts, and the same, if in proper form and of convenient size, shall be used in printing the record.

10. In all cases prosecuted to this court in which records or other matter shall be printed under the supervision of the clerk of this court, his fee for preparing the same for the printer, supervising the printing, indexing, and distributing the copies, shall be twenty-five cents for each printed page of the record and index, as provided by law.

RULE 24 (Seven Subdivisions).

The rule in the sixth circuit, being entirely different from that under this number in the other circuits, will follow the last subdivision of this rule on Briefs. The rule on "Briefs" in the sixth circuit is rule 20, above, and see also rule 21 in that circuit above.

BRIEFS.

24. SUBDIVISION 1.

1st

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least six days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2d

1. Counsel for the plaintiff in error, or appellant, shall file with the clerk of this court at least twenty days before the case is called for argument, ten copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

3d

1. In each case in which the printed record has been delivered by the clerk to the counsel for the plaintiff in error or appellant sixty or more days before the first day of the term, such counsel shall file twenty copies of his brief with the clerk not less than thirty days before the first day of such term; in each case in which the printed record has been delivered

by the clerk to such counsel between thirty days and sixty days before the first day of such term, twenty copies of such brief shall be filed with the clerk not less than twenty days before the first day of such term; and in all other cases twenty copies of such brief shall be filed with the clerk not more than fifteen days after receipt of such printed record. Within the same time such counsel shall give to counsel for the defendant in error or appellee not less than five copies of such brief.

4th

1. The counsel for plaintiffs in error or appellant shall file with the clerk of this court, at least fifteen days before every term or adjourned term, twenty (20) copies of a printed brief, one of which shall forthwith be furnished by the clerk to each of the counsel of record engaged upon opposite side.

5th

1. The counsel for the plaintiff in error, appellant or petitioner, shall file with the clerk of this court, at least fifteen days in ordinary cases, and five days in preference cases, before the case is called for argument, twenty copies of the printed brief, one to be signed in handwriting by an attorney of this court, who has entered an appearance in the case; one copy of the brief shall, on application, be furnished to each of the counsel engaged upon the opposite side. (As amended Jan. 12th, 1905.)

6th

See this circuit, subd. 1, rule 20, above.

7th

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, within twenty days after the date of the delivery by the clerk of the printed record, 20 copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

8th

1. Counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least forty days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

9th

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court twenty copies of a printed brief, and serve upon

counsel for the defendant in error or the appellee one copy thereof, at least fifteen days before the case is called for argument.

(To this rule were added the following notes: Briefs signed by counsel who are not members of the bar of this court or fully qualified under the provisions of rule 7 will not be considered by the court. See, also, subdivision 2 of rule 26.)

24. SUBDIVISION 2.

1st 2d —— 4th 5th —— 7th —— 9th

2. This brief shall contain, in order here stated,—

(1) A concise abstract or statement of the case presenting succinctly the questions involved, in the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and, in cases brought up by appeal, the specifications shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument exhibiting a clear statement of the points of law or facts to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3d

2. This brief shall contain, in the order here stated—

(a) The names of the parties and the nature of the proceedings.

(b) A short abstract of the bill or declaration or petition, and of the plea or answer.

(c) A statement of the question or questions involved, which shall be in the briefest and most general terms, without names, dates, amounts or particulars of any kind whatever.

(d) A concise abstract or statement of the case.

(e) The assignments of error relied on, and, where any assignment of error is based on any bill of exceptions or any part of a bill of excep-

tions, a reference to the particular page of the record where the exception may be found.

(f) Argument on the part of the plaintiff in error or appellant, which shall exhibit a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

6th

See this circuit, rule 20, subd. 2, above.

8th

2. This brief shall be printed on unglazed paper, and it and all quotations contained therein shall be in substantial conformity with the size and type prescribed by rule 26 for the printing of records and shall contain, in order here stated—

(1), (2) and (3) same as 1st circuit.

24. SUBDIVISION 3.

1st —— —— —— —— —— —— —— 9th

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief and serve upon counsel for plaintiff in error or appellant one copy thereof, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of error shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

2d

3. The counsel for a defendant in error, or an appellee, shall file with the clerk, at least ten days before the case is called for hearing, ten copies of his printed brief, one of which shall, on application, be furnished to each of the counsel on the opposite side. His brief shall be of a like character with that required of the plaintiff in error, or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error, or appellant, is controverted.

3d

3. At least five days before the case is called for argument, the counsel for the defendant in error or appellee shall file with the clerk twenty

printed copies of his brief, and give not less than five copies thereof to the counsel for the plaintiff in error or appellant. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case unless that presented by the plaintiff in error or appellant is controverted.

4th

3. The counsel for defendant in error, or appellee, shall file with the clerk of this court, at least five days before every term or adjourned term, twenty copies of a printed brief, one of which shall forthwith be furnished by the clerk to each of the counsel of record engaged upon the opposite side. His brief shall be of a like character with that required of the plaintiff in error or appellant, except no statement of the case shall be required, unless that presented by the plaintiff in error or appellant is controverted.

5th

3. The counsel for defendant in error, appellee or respondent shall file with the clerk of this Court, at least five days before the case is called for argument in ordinary cases, and before the case is called for argument in preference cases, twenty copies of a printed brief. His brief shall be of a like character with that required of the plaintiff in error, appellant or petitioner, except that no specification of errors shall be required and no statement of the case, unless that presented by the plaintiff in error, appellant or petitioner is controverted. (As amended Jan. 12, 1915.)

6th

See this circuit, subd. 3, rule 20, above.

7th

3. The counsel for the defendant in error or the appellee shall file with the clerk twenty printed copies of his brief within twenty days after the filing of the brief of the plaintiff in error or appellant. His brief shall conform to the requirements of this rule except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted. Either party, at or before the argument of the cause, may file a supplemental brief strictly confined to matter in reply to the brief of the opposite party.

8th

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty copies of his brief printed on unglazed paper and in substantial conformity with the size and type prescribed by rule 26 for the printing of records, at least ten days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

24. SUBDIVISION 4.

1st 2d —— —— 5th —— —— 8th 9th

4. When there is no assignment of errors, as required by § 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified. (See rule 11.)

3d 4th

In the third and fourth circuits, subdivision 4 is the same as 5 in the first circuit, below.

7th

4. When there is no assignment of errors, as required by § 997 of the Revised Statutes, counsel will not be heard, except at the request of the court, and errors not specified according to this rule, and rule 11, *ante*, will be disregarded; but the court at its option may notice a plain error involving the merits of the case, though not assigned or specified, and though the question be not saved according to the strict rules of practice, if it be apparent of record that the point was contested and not waived in the court below.

24. SUBDIVISION 5.

1st 2d —— —— 5th —— 7th 8th 9th

5. When, according to this rule, the plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant is in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

3d 4th

The above is subdivision 4 in the 3d and 4th circuits and their subdivision 5 is the same as 6 below.

24. SUBDIVISION 6.

1st 2d —— —— 5th —— 7th 8th 9th

6. When no counsel appears for one of the parties and no brief or argument is filed only one counsel will be heard for the adverse party; but, if a printed brief or argument ["has been" in 7th circuit] is filed, the adverse party will be entitled to be heard by two counsel.

3d—4th

In the 3d and 4th circuits the above is subdivision 5. In the 3d circuit there is no subdivision 6, and in 4th circuit, 6 is as follows:

6. Counsel for either party may file with the clerk of this court twenty printed copies of a reply brief, provided the same are filed at least three days before the case is reached in its regular order on the argument docket.

24. SUBDIVISION 7 (1st Circuit Only).

7. Every brief of more than twenty pages shall contain on its front fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where the cases are cited. (Added Dec. 14, 1917.)

6th

24. MOTIONS AND HEARING THEREON.

1. Motion shall be filed with the clerk and shall contain a brief statement of the facts and of the objects of the motion, and be accompanied by such affidavits as are thought proper.

6th

2. Counsel making the motion shall serve a copy thereof and of the accompanying papers and a notice of hearing upon the adverse counsel and also copy of any brief or any argument to be presented in support of the motion. Such notice may be for any day after four days from the service. The opposing party may, on or before the day named in the notice or within any extension of time made by the court or a judge thereof, file counter showing or brief; and the motion will then stand submitted, unless oral argument is directed. Except by stipulation, no motion will be considered without acknowledgment or proof of such notice.

3. Upon motion, there will be no oral argument, except leave of the court first obtained; and in such case, the court will fix the day for hearing and the time to be allowed for argument and the clerk will notify counsel.

RULE 25 (4 Subdivisions).

25. ORAL ARGUMENTS.

SUBDIVISION 1.

1st 2d 3d —— 5th —— 7th 8th 9th

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

4th

Same as in 1st circuit, with the following added: "Where there are cross writs of error the court may direct that they be argued together. In such event the plaintiff in the court below shall be entitled to open and conclude the argument."

6th

In the 6th circuit this numbered rule is called "Opinions" and is given after subdivision 3 below. Rule 23 above, in 6th circuit, deals with "Oral Arguments."

25. SUBDIVISION 2.

1st 2d 3d 4th 5th —— —— 8th 9th

2. Only two counsel will be heard for each party on the argument of a case.

6th

See rule 23, this circuit, as to "Oral Arguments."

25. SUBDIVISION 3.

1st —— 3d 4th —— —— 7th 8th ——

3. Two hours ["one hour and fifteen minutes," 8th circuit] on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their

discretion, provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

2d

3. Upon appeals from orders granting or refusing a preliminary injunction or appointing a receiver, and upon appeals and petitions to revise in bankruptcy, one half hour on each side, upon writs of error three quarters of an hour on each side, and in other cases one hour on each side will be allowed. But in all cases where there are no difficult questions of law and the amount involved does not exceed $500 only one half hour on each side will be allowed. No more time than above specified will be allowed without special leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion, provided always that a fair opening of the case shall be made by the party having the opening and closing argument.

5th

3. One hour will be allowed for the plaintiff in error or appellant to open and present his case, and one hour will be allowed to the defendant in error or appellee to answer; thirty minutes will then be allowed to the plaintiff in error or appellant to reply. No more time will be allowed for argument without special leave of the court. (As amended Feb. 27, 1894.)

6th

See rule 23, this circuit, below.

9th

3. One hour on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

25. SUBDIVISION 4 (7th and 9th Circuits only).

7th

4. Reading at length from briefs or reported cases shall not be indulged.

9th

4. Any case entitled to be heard at any term or session of the court may be submitted by either or both of the parties on briefs. Consent to submit a case on briefs may be filed at any time prior to, or at the time the case is reached for hearing. (To this rule was added the following note: See Rules 35 and 36.)

6th

25. OPINIONS.

1. All opinions delivered by the court will immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The clerk shall cause to be printed any manuscript opinion filed with him. An opinion printed under the supervision of the clerk or a judge, need not be copied into a book of records; but at the end of each term the clerk shall cause such printed opinion to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

Provisions governing "Oral Arguments" in the 6th circuit are contained in rule 23, for that circuit, above.

RULE 26.

1st

26. FORM OF PRINTED RECORDS, ARGUMENTS AND BRIEFS.

All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume.

2d

All arguments and briefs printed for the use of the court must be printed upon a page eleven inches long by seven inches wide and must have a margin of at least two inches in width. (As amended Dec. 7, 1899.)

3d

26. OPINIONS OF THE COURT.

1. All written opinions delivered by the court shall be filed by the clerk.

4th

26. FORMS OF PRINTED RECORD, ARGUMENTS, AND BRIEFS.

All transcripts of record, addenda thereto, arguments and briefs printed for the use of this court shall be in small pica type, 24 pica "ems" to a

line, on unglazed paper, with an index, and a suitable cover containing the title of the court, the cause, and the court from which the case is brought into this court, and the number of the case. Size of pages to be 9¼ x 6¼ inches, except that in patent cases the size of the pages shall be 10¾ x 7⅝ inches; that is to say, large enough to bind in copies of Patent Office drawings and specifications without folding. So much of the record as was printed in the court below may be used in this court if it conform to this rule.

5th

26. FORM OF PRINTED ARGUMENTS AND BRIEFS.

All records, arguments and briefs printed for the use of the court must be in such form and size that they can be conveniently bound together so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper. (Promulgated March 21, 1911.)

6th

26. INTEREST AND DAMAGES.

1. Where a judgment or decree of the district court at law, in equity, bankruptcy, or admiralty, requiring the payment of money, is affirmed by this court, interest thereon from its date and until payment shall be calculated and levied at the same rate borne by similar judgments or decrees in the courts of the state where such district court sits.

2. Where, in any such case the review in this court has delayed proceedings to collect the award in the district court, and shall appear to this court to have been had or prosecuted merely for delay, damages at a rate not exceeding ten per cent of the award, and in addition to interest may be imposed by this court.

7th

26. OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records, but, at the end of each term, the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound

they shall be deemed to have been recorded within the meaning of this rule.

8th

26. FORM OF PRINTED RECORDS, ARGUMENTS AND BRIEFS.

1. All transcripts of record, arguments and briefs for the use of this court, except in patent causes as hereinafter provided, shall be printed on unglazed paper not less than 6¼ inches in width x 9½ inches in length, including a sufficient margin so that they can be conveniently trimmed and bound in volumes. The paper should equal a weight of eighty pounds per ream on basis of size of sheet 25x38 inches.

2. All records and briefs in patent causes may be printed on unglazed paper, of the weight, as provided in § 1 of this rule, of such size that copies of letters patent may be inserted therein without folding, but the size of such records and briefs in patent causes shall not be less than 7½ inches wide and 9½ inches long, so that the records and briefs can be conveniently trimmed and bound in volumes.

3. All records, briefs, supplemental transcripts and returns to writs of *certiorari* shall be printed in clear 11-point or small pica type (never smaller than 10-point) of 26 pica or 28 small pica ems to a line, and 52 lines, including running head, solid, per printed page, containing substantially 1,400 small pica ems. Where testimony or deposition by question and answer are printed, the answer shall follow on the same line as question whenever the same can be done.

4. All indexes to records and tabular exhibits, which from their nature require smaller type may be printed in 8-point, or brevier type.

5. All covers for records shall be printed in a neat and workmanlike manner on substantial paper equal to a weight of 96 pounds per ream on the basis of a sheet 25x40 inches, and shall contain in conspicuous type the following matter, viz.:

First.

TRANSCRIPT OF RECORD.

Second.

UNITED STATES CIRCUIT COURT OF APPEALS EIGHTH CIRCUIT.

Third. The abbreviation for number "No." followed by a blank line ¾ of an inch in length.

Fourth. The title of the cause as it will be docketed in this court, viz.: ——, Appellant (or Plaintiff in Error), as the case may be, vs. ——, Appellee (or Defendant in Error).

Fifth. The words "In Error to" (or "Appeal from") as the nature of the case may require, followed by the correct title of the trial court.

6. Unless otherwise expressly directed by counsel, the full titles of the court and cause once correctly shown in the printed transcript shall not be repeated when unchanged. There shall be placed at the head of each subsequent pleading, etc., a brief designation of its character.

Unless otherwise expressly directed by counsel, the indorsements on pleadings, etc., shall not be printed in full; it shall be sufficient to print: "Filed in the —— Court on ——," giving the correct date and name of the court.

The date of all orders and decrees and the name of the judge or judges making them shall always appear.

In printed transcripts the pleadings, orders, testimony of witnesses, etc., shall be separated by a face rule three inches long. The clerk shall indicate to the printer the appropriate places therefor.

When inserts are folded several times to conform to the size of the printed record, stubs should be inserted at the binding side of the record to equalize the space occupied by the folds. Unmounted photographs should be used when copies of such are required in printed records.

As this rule is intended primarily for the guidance of the printer his attention should be directed thereto before the record or brief is printed.

A sample copy of a printed record will be furnished by the clerk of this court on application therefor.

Records and briefs not printed in substantial conformity with the provisions of this rule will not be accepted or filed.

9th

26. FORM OF PRINTED RECORDS, ARGUMENTS, BRIEFS, AND PETITIONS FOR REHEARING.

1. All records printed for the use of the court must be printed on unglazed paper, 9¼ inches long and 6¼ inches wide. The printed page, exclusive of any marginal note, reference or running head, must be 7 inches long and 4 inches wide, excepting in patent cases where counsel furnish to the clerk at the time of docketing the cause patent office drawings and specifications for insertion. In such cases the margin of the record may be sufficiently enlarged to accommodate such drawings and specifications. The record must be properly indexed. Pica double-leaded is the only mode of composition allowed.

2. All arguments, briefs and petitions for rehearing, printed for the use of the court, must be printed on unruled white writing paper, 9¼ inches long and 6¼ inches wide. The printed page, exclusive of any marginal note, reference or running head, must be 7 inches long and 4 inches wide. Pica double leaded is the only mode of composition allowed.

RULE 27.

1st 2d —— —— 5th —— —— —— 9th

27. COPIES OF RECORDS AND BRIEFS.

The clerk shall carefully preserve in his office one copy of a printed record in every case submitted to the court for its consideration and of all printed motions, briefs, and arguments filed therein.

3d.

27. REHEARING.

1. A petition for rehearing a cause may be filed with the clerk at any time within thirty days after the entry therein of the final judgment or final decree of this court, and, if the term within which such judgment or decree shall have been entered shall expire during said period of thirty days, the judgment or decree, and the record on which the same shall have been entered, shall nevertheless remain subject to the control of this court until the full expiration of the time herein allowed for the filing of the petition; *Provided, however,* that no such petition shall be filed after this court, by any order made within said period of thirty days, shall have directed the immediate issue of a mandate or other process in the nature of a *procedendo* (see rule 30). The petition shall be printed, shall briefly and distinctly state the reasons for a rehearing, and shall be supported by the certificate of counsel.

4th

27. COPIES OF RECORDS AND BRIEFS.

The clerk shall cause to be bound two copies of the printed record in every case, and of all printed motions, briefs and arguments filed therein; one copy to be carefully preserved in his office, and one copy for the use of the court library. The cost of the same to be paid for by the clerk out of the revenues of his office.

6th

27. COSTS.

1. Where any case shall be dismissed out of this court for lack of jurisdiction herein, only such costs as are incidental to hearing and determining the question of jurisdiction will be awarded; in all other cases (except when provided by statute or general rule) upon the final disposition of a proceeding in this court costs will be awarded to the party here prevailing, unless the court, by a special direction, denies, otherwise awards or apportions the costs.

2. In cases to which the United States is a party, no costs in this court will be awarded.

3. In denying or apportioning costs under clause 1, the court will enforce, as far as possible, the duty of each party to confine within the limits prescribed by rules 10 and 15 the bill of exception, statement of evidence, and transcript.

4. The cost of stenographers' transcripts of testimony used in settling a bill of exceptions, or a statement of evidence, will not be taxed in this court, but shall be awarded and taxed by the court below after mandate, as this court may direct, or lacking such direction as to that court shall seem proper.

5. When costs are allowed it shall be the duty of the clerk to insert the amount thereof in the body of the mandate or other process sent to the court below, and annex to the same a bill of items taxed in detail.

6. The proper fees of the clerk therefor shall be paid before any transcript of the record in any case shall be transmitted to the Supreme Court.

TABLE OF COSTS.

Order Promulgated by the Supreme Court of the United States February 28, 1898.

Ordered, In pursuance of the Act of Congress of February 19, 1897 (29 Stats. 536, c. 263), that the following table of fees and costs in the circuit courts of appeals be, and the same is hereby, established, to take effect on the first day of March, A. D. 1898, and no other fees and costs than those therein named shall thereafter be charged:

Docketing a case and filing the record	$ 5 00
Entering an appearance	25
Transferring a case to the printed calendar	1 00
Entering a continuance	25
Filing a motion, order or other paper	25
Entering any rule, or making or copying any record or other paper, for each one hundred words	20
Entering a judgment or decree	1 00
Every search of the records of the court and certifying the same	1 00
Affixing a certificate and a seal to any paper	1 00
Receiving, keeping and paying money in pursuance of any statute or order of court, one per cent on the amount so received, kept and paid.	
Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index	25

Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing)	20
Issuing a writ of error and accompanying papers, or a mandate or other process	5 00
Filing briefs, for each party appearing	5 00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed five dollars in the whole for any copy)	1 00
Attorneys' docket fee	20 00

7th

27. REHEARING.

A petition for rehearing must be filed within thirty days after entry of judgment or decree, or after filing of the opinion, shall be in print, and be served forthwith by copy upon the opposing party, who, within twenty days from such service, may file a printed answer, and the petition shall be determined without oral arguments, unless otherwise ordered. If a petition be not filed within the time allowed, and upon the overruling of a petition, the clerk shall, without special order, issue the mandate of the court to the court below. Twenty copies of such petition or answer shall be filed with the clerk of this court.

8th

27. COPIES OF RECORDS AND BRIEFS.

The clerk shall cause to be bound in volumes in a substantial manner and shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, and arguments filed therein.

RULE 28.

1st 2d —— —— 5th —— —— 8th ——

28. OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. [This subdivision in 8th circuit immediately below.] Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but, at the end of each

term, the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

8th

3. Opinions printed or prepared under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but, at the end of each term, the clerk shall cause such printed or original opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded, within the meaning of this rule.

28. INTEREST.

3d

[Rule on "Opinions' is rule 26 in 3d circuit.]

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment was rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

4th

28. OPINIONS OF THE COURT.

1. All opinions delivered by the court shall be printed under the supervision of the judge delivering the same, or of one of the circuit judges, the cost of such printing to be paid by the clerk out of the revenues of his office and charged to the litigants in the respective cases, to be taxed and allowed as other costs.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. The clerk of this court shall from time to time cause two sets of the printed opinions of this court to be bound in a substantial manner

into volumes, one set to be kept in the clerk's office and one set to be kept in the court library.

6th

28. REHEARINGS.

A petition for rehearing after judgment can be presented only within thirty days (at the same or succeeding term) after the day when the printed opinion of the court is filed, and can be obtained by counsel for the parties (which date the clerk will note upon the docket), unless by special leave granted during such thirty days by the court or a judge thereof, and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel, and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determines.

[Rule on "Opinions" is rule 25 in 6th circuit.]

7th

28. INTEREST.

1. When a judgment for the payment of money is affirmed by this court, the interest thereon shall be calculated and levied from the date of the judgment below until the same is paid, and at the same rate that similar judgments bear interest in the courts of the state where such judgment was rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded on the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

5. In cases where money is paid into court, any party interested may move for an order that the clerk deposit the same under the direction of the court. On deposits so made, the clerk shall account for such interest as he may have collected on the fund.

9th

28. OPINIONS OF THE COURT.

The original opinions of the court shall be filed with the clerk of this court for preservation, and when so filed the same shall be deemed to have been recorded within the meaning of this rule.

RULE 29.

1st

29. REHEARING.

A petition for a rehearing after judgment may be filed at the term at which the judgment is entered, and within one calendar month after such entry, and not later unless by leave granted during the term. It must be in print, in the form and style required by rule 26, and it must briefly and distinctly state its grounds, and be supported by a certificate of counsel. It will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determines. Provided, Whenever a judgment is entered within less than a month before the term adjourns, the petition may be filed within a month after the entry of judgment, and with the same effect after the term as though filed before the adjournment. (As amended Oct. 4, 1898.)

2d

29. REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

3d

29. COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of transcript of record from the court below shall be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process sent to the court below and annexed to the same, the bill of items taxed in detail.

6. In all cases certified to the Supreme Court or removed thereto by *certiorari* or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

7. In pursuance of the act of Congress of February 19, 1897 (29 Stats. 536, c. 263), and of the order of the Supreme Court of January 10, 1898, as amended February 28, 1898 (90 Fed. Rep. clxxi), the following table of fees and costs is established for this court: [This table is set out above under 6th circuit, rule 27, subd. 6.]

4th

29. REHEARING.

A petition for rehearing can be presented only within thirty days after judgment is entered, unless by special leave granted before the expiration of said 30 days; and must be printed and briefly and distinctly state its grounds, and be supported by its certificate of counsel; and will not be granted, or permitted to be argued, unless judge who concurred in the judgment desires it, and the majority of the court so determine. But such petition shall not operate to stay the mandate or other process provided for in rule 32, except by special order of the court.

5th

29. REHEARING.

A petition for a rehearing after judgment can be presented only during the term at which judgment is entered, and within twenty days after such entry, unless by special leave granted by the Court, or one of the judges, and must be printed and briefly and distinctly state its grounds without argument, and be supported by certificate of counsel; and will not be granted or permitted to be argued unless a judge who concurred in the judgment desires it and a majority of the Court so determines. (As amended Jan. 12, 1905.)

6th

29. MANDATE.

In all cases finally determined in this court, a mandate, or other process in the nature of a *procedendo*, shall be issued to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

Such mandate shall not issue until time has elapsed for filing a petition to rehear, as defined by rule 28; and no mandate or other process of *procedendo* shall issue when a petition to rehear is pending, unless specially ordered.

Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case.

In cases not requiring special form of process, the mandate (unless otherwise directed by the court or a judge thereof) shall be issued by the clerk upon the expiration of time for filing rehearing petition, or upon the denial of such petition, and as well in vacation as in term time.

7th

29. COSTS.

1. When any suit shall be dismissed in this court, except for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In every case of a judgment or decree affirmed in this court costs shall be allowed to the defendant in error or appellee unless otherwise ordered by the court.

3. In every case of reversal of a judgment or decree in this court costs shall be allowed to the plaintiff in error or appellant unless otherwise ordered by the court. The costs of the transcript of the record from the court below shall be taxable in that court as costs in the case.

4. No costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, directing to award execution thereupon and to annex to the same the bill of items taxed in detail.

6. In all cases certified to the Supreme Court or removed thereto by *certiorari* or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

7. The fees of the clerk of this court, as prescribed by order of the Supreme Court, made February 28, 1898, are as follows: [This table is set out above under 6th circuit, rule 27, subd. 6.]

8th

29. REHEARING.

1. A petition for rehearing may be presented and filed within sixty days after the date of the judgment or decree, and jurisdiction to hear and decide the question presented thereby is reserved, notwithstanding the lapse of the term within the sixty days.

2. Such petition for hearing must be printed and twenty copies thereof filed with the clerk and must briefly and distinctly state its grounds and be supported by a certificate of counsel, and will not be granted or permitted to be argued unless the judge who concurred in the judgment desires it, and a majority of the court so determines.

9th

29. REHEARING.

A petition for rehearing may be presented within thirty days after judgment. It must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel that in his judgment it is well founded, and that it is not interposed for delay. Twenty printed copies must be filed with the clerk. See, also, subdivision 2 of rule 26 and rule 32.)

RULE 30.

1st 2d —— 4th 5th —— —— 8th 9th

30. INTEREST.

1. In cases where a writ of error is prosecuted in this court and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state or territory[1] where such judgment was rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases of[2] equity, unless otherwise ordered by this court.

4. In cases of[2] admiralty damages and interest may be allowed, if specially directed by the court.

1 In the 4th circuit the words "or territory" are omitted.
2 Substitute "in" for "of" in 8th circuit.

3d

30. MANDATE.

1. In each case finally determined in this court, a mandate or other proper process in the nature of a *procedendo* shall be issued to the court below, for the purpose of informing such court of the proceedings in this court so that further proceedings may be had in such court as to law and justice may appertain. Such mandate or other process may issue at any time on the order of the court, and, when not otherwise ordered, it shall issue as of course at the expiration of thirty days from the date of entering the final judgment or final decree of this court.

Provisions governing "interest" in the 3d circuit, identical with those in rule 30 for the 1st circuit, are contained in rule 28 for the third circuit.

6th

30. PHYSICAL EXHIBITS.

1. Physical exhibits, not returned with the record but which are to be used on the hearing, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

2. All such physical exhibits shall be taken away by the parties promptly after the mandate issues. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule, and if the articles are not removed within reasonable time after the notice is given, he shall destroy them or make such other disposition of them as to him may seem best.

Provisions governing "interest" and damages in the 6th circuit are contained in rule 26 above.

7th

30. MANDATE.

In all cases finally determined in this court, a mandate or other proper process in the nature of a *procedendo* shall be issued, on the order or by the rule of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

Provisions governing "interest" in the 7th circuit are contained in rule 28 above.

RULE 31.

1st 2d —— 4th 5th —— —— 8th 9th

31. COSTS.

1. In all cases where any suit shall be dismissed in this court,[1] except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.[2]

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3.[3] In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant,[4] unless otherwise ordered by the court.

4.[3] The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

5.[5] Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

6.[6] When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

7.[7] In all cases certified to the Supreme Court or removed thereto by *certiorari* or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.[8]

[1] In the 8th and 9th circuits the following words are omitted after note number: "except where the dismissal shall be for want of jurisdiction."

[2] In the 9th circuit substitute for the words "agreed by the parties," the words "ordered by the court."

[3] In the 2d, 4th and 5th circuits, 3 and 4 as given above are combined in 3.

In the 2d circuit the following is added to 3 and 4, combined as subd. 3: "And the clerk of the court below shall send to the clerk of this court with the transcript of record a certificate of the cost of such transcript."

In the 4th circuit the following is added to 3 and 4, combined as subd. 3: "The expense of printing, however, shall be taxed at actual cost (to be shown by the affidavit of the printer), but in no event to exceed twenty cents per folio of one hundred words."

In the 8th circuit the following is added to 3 and 4, combined as subd. 3: "Where the record has been printed in this court under the provisions of §§ 1 and 2 of rule 23, the cost of printing thirty copies of the transcript of record from the court below shall be taxed as costs in the case, unless otherwise ordered by this court, but no allowance shall be made for the amount paid to the clerk of the court below for the written or typewritten transcript

of the record. Where the record has been printed in the court below and a copy of such printed record certified to this court the cost of printing twenty-five copies of such record or portion thereof shall be taxable as costs in the case in the court below, unless otherwise ordered by this court."

[4] In the 9th circuit the following is added after the note number: "including the cost of transcript from the court below."

[5] In the 2d, 4th, 5th, 8th and 9th circuits subd. 5 is numbered 4.

[6] In the 2d, 4th, 5th, 8th and 9th circuits subd. 6 is numbered 5.

[7] In the 2d, 4th, 5th, 8th and 9th circuit subd. 7 is numbered 6.

In the 4th and 9th circuits an additional subdivision, numbered 7 is added.

In the 4th it reads: "7. The following table of fees and costs, established under the act of Congress of February 19, 1897 (29 Stats. 536, c. 263), shall remain and continue in effect with the promulgation of these rules." (Here follows the table which is the same as that set out above in 6th circuit, Rule 27, subd. 6.)

In the 9th circuit the additional subdivision is as follows: "7. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of any bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively to compel payment of said fees."

[8] In the 8th circuit add to subdivision 7, at the end thereof, the following: "except that no fees shall be charged or collected for any printed record or portion thereof required by law to be used by the clerk in the preparation of such transcript of record."

3d **7th**

31. CUSTODY OF PRISONERS ON HABEAS CORPUS.

[Rule on "Costs" in 3d and 7th circuits is rule 29.]

[Other circuits this is rule 33.]

1. Pending an appeal from the decision of any court or judge declining to grant the writ of *habeas corpus,* the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from a final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

6th

31. LIBRARY.

[Rule on "Costs" in 6th circuit is rule 27.]

All money collected by the clerk, the disposition of which is not otherwise directed by law, shall constitute a fund to be expended by the

clerk under the direction of the presiding judge, in the purchasing, repairing, and rebinding of law books for the library of the court; and it shall be his duty to render to the court, for its examination and approval an annual account of such money received by him and of his disbursements thereof.

7th

31. CUSTODY OF PRISONERS ON HABEAS CORPUS.

Same as for 3d circuit above.

Rule on "Costs" in the 7th circuit is rule 29.

RULE 32.

— 2d — 4th — — — 8th 9th

32. MANDATE.

In all cases finally determined in this court, a mandate or other proper process in the nature of *procedendo*, shall[1] be issued,[2] on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.[3]

1 In the 9th circuit, for the words following the note number, "be issued on order of this court," substitute the following, "upon payment of any costs due in this case, be issued as of course from this court."

2 In the 4th circuit omit these words following note number: "on the order of this court."

3 In the 4th circuit the following is added to the rule above quoted: "Such mandate or other process, may issue at any time on the order of the court; but unless otherwise ordered, it shall issue as of course after the expiration of thirty days from the date of the judgment or decree."

In the 9th circuit the following is added to rule 32 first above quoted: "Such mandate, if not stayed by the order of the court, shall be issued on the expiration of thirty days from the date of such final determination, unless within said time a petition for rehearing be filed, in which case the mandate shall be stayed until five days after the determination of such petition."

In the 8th circuit the following note is added: "By an order entered March 30, 1911, the Clerk is directed to issue a mandate or other proper process, to the court below, in all cases, sixty days after the final disposition thereof, except in cases where it shall be otherwise expressly ordered."

1st

32. MANDATE.

In every case finally determined, a mandate, or other proper process in the nature of a *procedendo*, shall be issued to the court below, for the purpose of informing that court of the proceedings in this court, so that

further proceedings may be had in the court below as to law and justice may appertain. Such mandate, or other process, may issue at any time on the order of the court; but, unless otherwise ordered, it shall issue as of course after two calendar months from the entry of judgment, unless a petition for a rehearing has been filed and remains undisposed of.

3d

32. MODELS, DIAGRAMS AND EXHIBITS OF MATERIAL.

[This is subject of rule 30, 6th circuit; rule 32, 7th circuit; rule 34, other circuits.]

1. Models, diagrams and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the clerk of this court at least ten days before the case is heard or submitted.

2. All models, diagrams and exhibits of material placed in the custody of the clerk for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the clerk to notify the counsel in the case, by mail or otherwise, of the requirements of this rule, and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

This concludes the rules in the 3d circuit.

5th

32. MANDATE.

Mandates shall issue at any time after twenty-one days from the date of the decision, unless an application for a rehearing has been granted or is pending. A copy of the opinion of this court shall accompany the mandate when a new trial or further proceedings are to be had in the lower court, and the charge for such copy shall be taxed in the costs of the case. Provided that in all cases entitled to precedence in this court under § 7 of the act approved March 3, 1891, and amendments thereto, the mandate or other proper process shall issue after the expiration of seven days from the date of the decision, unless otherwise ordered by the court or one of the judges. (As amended Jan. 12, 1905.)

6th

32. CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of *habeas corpus*, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in the custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

7th

32. MODELS, DIAGRAMS AND EXHIBITS.

[See rule in 3d circuit above.]

Models, diagrams and exhibits of material forming part of the evidence taken in the court below, and in any case pending in this court on writ of error or appeal, shall be placed in the custody of the marshal for the use of this court at least ten days before the case is heard or submitted; and shall be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule, and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy or make such other disposition of them as to him may seem best.

RULE 33 (Except 3d Circuit Concluded).

1st 2d —— 4th 5th —— —— 8th 9th

33. CUSTODY OF PRISONERS ON HABEAS CORPUS.

[In the 3d and 7th circuits this is rule 31, and in the 6th, rule 32.]

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of *habeas corpus*, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be re-

manded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

6th

33. MANDAMUS AND PROHIBITION.

[Rule on "Custody of Prisoners on *Habeas Corpus*" is rule 32, 6th circuit.]

1. The alternative writ of *mandamus* will not be issued, but on proper showing an order to show cause will be made.

2. A party desiring a writ of *mandamus* or prohibition shall file his petition therefor and showing in support thereof together with such brief or memorandum as he may desire. These need not be, at this time, printed, and notice need not be given. He shall deposit ten dollars with the clerk on account of fees. The clerk shall enter the application on his docket, and informally submit the papers to the court.

3. If the court is of the opinion that the application justifies a hearing, an order to show cause will be entered returnable as promptly as the situation permits; if of contrary opinion, an order of denial will be made, and the clerk shall notify the applicant accordingly, enter the case on his docket as closed and return to the applicant the surplus, if any, of the fee deposited.

4. If such order to show cause is made, the clerk shall deliver a certified copy to the applicant who shall cause the same to be served within the time and in the manner fixed in the order. An answer or return shall be filed on or before the return day as specified in the order or as extended by a judge of this court. Unless within ten days after the filing of such answer or return the appellant makes special motion to award and frame issue, or, if an issue is framed, then upon the return of the proceedings thereon, and unless the court orders a hearing as upon motion, the matter shall stand for hearing upon the calendar and the clerk shall receive the remaining twenty-five dollars of the usual fee deposit, estimate and require a deposit for printing and print the record, briefs shall be filed, and the matter in all respects proceed like other docketed causes.

7th

33. LAW LIBRARY.

1. The library of the court shall be under general supervision and custody of the clerk of the court.

2. No books shall be removed from the library except upon a written order of a judge of this court, except, that during the sessions of the court any lawyer who has a case on the docket, upon written application to the clerk and upon the clerk's written order, may take from the library not exceeding three volumes at a time, being responsible for the return thereof within twenty-four hours and in default of return shall pay to the clerk for the library fund twice the value thereof, but if returned in good condition one dollar for each day's detention beyond the limited time.

RULE 34 (Except 3d Circuit, Concluded).

1st —— —— 4th 5th —— —— 8th 9th

34. MODELS, DIAGRAMS AND EXHIBITS OF MATERIAL.

[In the 3d and 7th circuits this is subject of rule 32, in the 6th, rule 30.]

1. Models, diagrams and exhibits of material, forming a part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal ["clerk," 2d and 4th circuits] of this court at least ten days before the case is heard or submitted.

2. [Omitted in 2d circuit.] All models, diagrams, and exhibits of material, placed in the custody of the marshal ["clerk," 4th circuit] for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done it shall be the duty of the marshal ["clerk," 4th circuit] to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

2d

34. MODELS, DIAGRAMS AND EXHIBITS OF MATERIAL.

1. Models, diagrams and exhibits of material, forming a part of the evidence taken in the court below, in any case pending in this court, on

writ of error or appeal, except customs cases, shall be placed in the custody of the clerk of this court at least ten days before the case is heard or submitted.

2. Three copies must be furnished for the use of the court of any maps, charts, plans, diagrams, or other papers or documents which it is intended to refer to on the argument, and which are not contained in the transcript of record as certified from the court below.

3. All exhibits of material in customs cases must be filed with the clerk at the time of filing the transcript of record, and such exhibits will be returned to the clerk of the district court at the expiration of sixty days from the decision of the case by this court. All other models, diagrams, and exhibits of material placed in the custody of the clerk for the inspection of the court on the hearing of a case must be taken away by the parties within one month after the case is decided. It shall be the duty of the clerk to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within the time above specified, he shall destroy them, or make such other disposition of them as to him may seem best.

6th

34. PETITION TO REVISE IN BANKRUPTCY.

[Rule as to "Physical Exhibits" is rule 30, 6th circuit.]

1. A petition to revise shall contain, *first,* a concise history of so much of the proceedings before the referee and the district court as may be necessary to make plain the errors assigned; *second,* an assignment of the errors in respect to which revision in matter of law is sought; *third,* as exhibits to the petition, copies certified by the clerk of the district court of each paper or proceeding relied upon to support the errors assigned; and *fourth,* any findings of fact that may be filed pursuant to clause 2 hereof; but a petition to revise shall not be filed so late as to delay the hearing of any appeal that may have been taken in the same matter; and it may incorporate, by reference and without repeating, any parts of the return in such appeal.

2. Whenever the district court has made any order in a proceeding in bankruptcy which involves or depends upon facts made to appear otherwise than solely by the pleadings in the matter, and the district judge is notified in writing by any party that he intends to file a petition to revise and deems finding of fact to be necessary, it shall be the duty of the district judge, as soon as possible, to make and file with the clerk of the district court his findings of fact in such matter.

3. At or before the filing of such petition, a complete copy thereof shall be served upon counsel for each separate, adverse interest, and the petition, when offered for filing, shall contain due proof or acknowledgment of such service.

4. Unless within ten days after the filing of such petition an adverse party in interest shall file an answer denying the accuracy of the exhibits to the petition, or setting out as exhibits certified copies of additional papers or proceedings which are thought to bear upon the errors assigned, the accuracy and completeness of the exhibits shall be presumed to be admitted. Such answer may also incorporate by reference any orders or records in any co-pending appeal.

5. Upon the coming in of such answers or the expiration of such ten days, such petition shall stand for hearing, and the clerk shall estimate and require deposit for and cause the record to be printed, and briefs shall be filed, all as in other causes.

This concludes the rules in the sixth circuit.

7th

34. WRITS OF ERROR IN CRIMINAL CASES.

[Rule as to "Models, Diagrams and Exhibits" is rule 32, 7th circuit.]

1. Writs of error from this court to review criminal cases tried in any district or circuit court of the United States within this circuit, may be allowed in term time or in vacation by the circuit justice assigned to this circuit, or by any of the circuit judges, within the circuit or by any district judge within his district, or the proper security be taken, and the citation signed by him, and he may also grant a *supersedeas* and stay of execution or proceedings, pending the determination of such writ of error.

2. Where such writ of error is allowed in the criminal cases aforesaid, the circuit court or district court before which the accused was tried or the district judge of the district wherein he was tried, within his district, or the circuit justice assigned to this circuit, or any of the circuit judges within the circuit, shall have the power, after the citation has been duly served, to admit the accused to bail and to fix the amount of such bail.

This concludes the rules in the seventh circuit.

RULE 35 (Except 3d, 6th and 7th Circuits, Concluded).

1st

35. ERROR IN CRIMINAL CASES.

On or after the allowance of a writ of error in a criminal case, cognizable by this court, the justice or judge who allowed the writ, or the court which entered the judgment, or any judge thereof, shall have power to admit to bail the plaintiff in error, according to the rules of law applicable to his case.

2d

35. ALLOWANCE OF APPEALS AND WRIT OF ERROR—BAIL.

1. An appeal or writ of error from a circuit court or a district court to this court in the cases provided for in §§ 6 and 7 of the act entitled "An Act to Establish Circuit Courts of Appeals and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes," approved March 3, 1891, and acts to amend said act approved February 18, 1895, and January 20, 1897, may be allowed in term time or vacation by the circuit justice or by any circuit judge within the circuit or by any district judge within his district, and the proper security be taken and the citation be signed by him, and he may also grant a *supersedeas* and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error from this court is allowed in the case of a conviction of an infamous crime or in any other criminal case in which it will lie, the district court or the judge thereof, or any circuit judge of the circuit or the circuit justice, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed. (Adopted May 3, 1897.)

4th

35. SATURDAY CONFERENCE DAY.

Clerk in making his docket shall not set down for argument any cause for any Saturday of the term for which such docket is intended, and this court will meet on said days for consultation only.

5th

35. ORDER IN RELATION TO ASSIGNMENT OF CASES FOR HEARING.

Unless otherwise ordered by the senior circuit judge, thirty days prior to the opening of a regular session of this court, the clerk is directed to assign cases for hearing as follows:

At Atlanta, Georgia, four cases per day for the first three days of each week;

At Montgomery, Alabama, four cases for the first three days of each week;

At Fort Worth, Texas, four cases per day for the first three days of each week;

At New Orleans, Louisiana, two cases per day for the first three days of each week.

The above assignments shall be made in accordance with existing law regulating the return of appeal, writs of error and other appellate proceedings in the fifth judicial circuit: Provided that cases entitled by law to preference in hearing and bankruptcy cases shall be first assigned, and cases, whether preference or not, may upon stipulation of the parties filed with the clerk and approved by the court, be assigned for hearing at any other place or session of this court designated in such stipulation.

Except as hereinabove provided, the assignment of cases at New Orleans, Louisiana, shall be grouped by states, so as to permit the hearing of cases from one state before the cases from the next state in order shall be called. (As amended Oct. 15, 1906.)

8th

35. WRITS OF ERROR IN CRIMINAL CASES.

1. Writs of error to review criminal cases tried in any district court of the United States within this circuit, which may be reviewed under the provisions of "the Judicial Code," approved March 3, 1911, may be allowed in term time or in vacation by the circuit justice assigned to this circuit, or by either of the circuit judges within the circuit, or by any district judge within his district, and the proper security be taken, and the citation signed by him, and he may also grant a *supersedeas* and stay of execution or proceedings, pending the determination of such writ of error.

2. Where such writ of error is allowed in the criminal cases aforesaid, the district court before which the accused was tried, or the district judge of the district wherein he was tried, within the district, or the circuit justice assigned to the circuit, or either of the circuit judges within the circuit, shall have the power, after the citation has been duly served, to admit the accused to bail in such amount as may be fixed, such bail bond to be, as near as may be, in the form prescribed in the Appendix to these rules.

9th

35. ASSIGNMENT OF CAUSES FOR HEARING.

1. Thirty days prior to the opening of any calendar session of the court, the clerk is directed to assign causes for hearing at the rate of one case for the first day of each term or session, and two cases per day for each of the ensuing court days of such term or session. The causes shall be grouped by states, and assignments made, so as to permit the hearing of causes from one state before the causes from the next state in order shall be called; causes from the northern district of California shall be assigned for hearing last. Any causes entitled by law to preference in hearing shall be first assigned and take precedence over other causes from the same state.

2. No change of the day assigned for hearing will be made except by order of the court for reasons shown, and no term or session of the court will be extended beyond the foot of the calendar as made up pursuant to the provisions of this rule.

3. Ten days before each calendar session of the court the clerk shall prepare and cause to be printed a calendar of the causes assigned for the approaching session.

RULE 36 (None in 3d, 6th and 7th Circuits).

1st —— —— —— —— —— —— —— ——

36. RULES IN BANKRUPTCY.

1. On the filing of a petition for the exercise of the power of superintendence and revision vested in this court by the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, or under any acts which may hereafter be passed in addition thereto or amendatory thereof, the clerk shall issue, as of course, an order to show cause, returnable two weeks from the date thereof, which shall be served by copy on each of the adverse parties named in the petition as a person against whom relief is desired, or as solicitor in the proceeding in the district court, at least one week before the return day of the order, which service shall be made by the marshal or his deputy in the district where the party or solicitor served resides.

2. Within one calendar month after the return day of the order to show cause, either party may demur, plead or answer; but the determination of any demurrer, plea or answer, shall be final, and no order to plead over will be allowed; and any party may secure in his answer all the advantages of a demurrer or plea, or both, by inserting therein

the proper allegations therefor. No demurrer shall be general, and no cause of demurrer shall be allowed unless specifically set forth therein.

3. There shall be no pleadings in reply by the petitioner; but any new matter properly in reply shall be available without the same being pleaded in the petition, or otherwise.

4. A motion to dismiss may be filed within the time allowed for a demurrer, plea or answer; or the subject matter thereof, if it relates to the substance of the proceeding or to the jurisdiction of the court may be availed of on demurrer, plea or answer, by proper allegations; and whenever a motion to dismiss is seasonably filed, the time for filing demurrer, plea or answer, will run from the day on which an order may be entered overruling the motion. Every motion to dismiss shall be filed in print, accompanied with a printed brief; and each of the opposing parties shall forthwith be served by the clerk, through the mail or otherwise, with a copy of the motion and of the brief, and he may file, in print, a brief in reply within two weeks. At the expiration of the time allowed for filing the brief in reply, the motion and briefs will be distributed by the clerk to the circuit judges, and to the district judge, senior in commission, who is not disqualified. Thereupon the motion will be disposed of by the court on the briefs, unless, at its own suggestion, or for good cause shown, the court shall order oral arguments.

5. So much of the rule 14 as relates to *viva voce* proofs in the district courts, or to further proof in instance causes in admiralty shall apply to appeals and petitions authorized by the act aforesaid, or by acts hereafter passed additional thereto or amendatory thereof; provided any record on any such appeal or petition may be supplemented by any matter agreed to in writing by the parties and filed with the clerk.

6. The rules with reference to records, printing and briefs, and all other rules, except as herein modified, shall apply to the proceedings to which this order relates.

7. Nothing herein shall prevent the court, from time to time, from making, for special cause, orders diminishing or enlarging the times named herein, or any other orders suitable to expedite the proceeding, or to prevent injustice.

2d

36. SECURITY FOR CLERK'S FEES—TAXING COSTS.

1. In all cases the plaintiff in error or appellant on docketing a case and filing a record, shall enter into an undertaking with the clerk, for the payment of his fees or otherwise satisfy him in that behalf.

2. At the expiration of ten days after a case has been decided, the order or decree thereon will be entered by the court, and the clerk will thereupon prepare and tax the bill of costs and issue the mandate. Within said ten days the parties may file with the clerk their proposed orders or decrees and bills of costs with proof of service of the same upon the opposing attorneys.

4th

36. BANKRUPTCY.

1. Upon the filing of the petition for review as provided for in § 24 (b) of the act to establish a uniform system of bankruptcy throughout the United States, approved July 1st, 1898, the clerk of this court shall docket the cause, and shall forthwith serve a certified copy of petition upon the respondent or respondents, or their solicitors, through the mail or otherwise, together with a notice to the respondent or respondents, to answer, demur, or move to dismiss the said petition within the fifteen days from the date of such notice. Petitions to review orders in bankruptcy filed under the provisions of section 24b of the Bankruptcy Act must be filed within ten days after the entry of the order sought to be reviewed, but any Judge of this Court may, for good cause shown, enlarge the time for filing the petition, provided, the order of enlargement is made before the expiration of the time hereby limited for filing the petition. Said order to be filed with the Clerk of this Court.

2. The petitioner shall cause a certified printed transcript of the record and proceedings of the bankruptcy court of the matter to be reviewed, to be filed in the clerk's office of this court within forty days from the date of the filing of his petition for review.

3. By consent of all parties to the cause, by stipulation in writing filed with the clerk of this court, the petitioner may cause a transcript of the record and proceedings of the bankruptcy court of the matter to be reviewed to be filed in the clerk's office of this court in lieu of a certified printed transcript as above mentioned, and thereupon the clerk of this court shall cause the record to be printed as provided in the 23d rule of this court, and furnish counsel on both sides with three copies each.

4. And such causes shall stand for hearing in their regular order. But either side may, upon ten days' notice given to the opposing counsel, have the cause heard, either at term time, or in vacation, or in chambers, upon the briefs, unless at its own suggestion, or for good cause shown, the court shall order oral argument.

5. That all causes coming up by appeal as provided in § 25 of said bankruptcy act shall stand for hearing in this court, either in term time

or in vacation, and may be called up by either party upon ten days' notice, as provided in § 4 of this rule.

6. All rules of this court (except as herein modified) shall apply to the proceedings in bankruptcy to which this rule relates.

7. Nothing herein shall prevent the court, from time to time, from making, for special cause, orders diminishing or enlarging the times named herein, or any other order suitable to expedite the proceeding or to prevent injustice.

5th

36. ASSIGNMENT OF JUDGES.

It is ordered that whenever a full bench of three judges shall not be made up by the attendance of the associate justice of the Supreme Court assigned to the circuit, and of the circuit judges, so many of the district judges, in the order of seniority of their respective commissions and qualified to sit, as may be necessary to make up a full court of three judges, are hereby designated and assigned to sit in this court: Provided, however, that the court may at any time, by particular assignment, designate any district judge to sit as aforesaid.

8th

36. PETITIONS TO REVISE.

A petition to revise, under the provisions of § 24 (b) of the bankruptcy law, approved July 1st, 1898, shall be filed and docketed as an original action in this court, and be entitled "——, Petitioner, v. ——, Respondent," and shall specifically designate the respondent or respondents upon whom the petitioner desires notice to be served, and a sufficient number of copies of such petition shall be furnished the clerk at the time of filing so that a copy may be served upon each of the respondents.

9th

36. TERMS AND SESSIONS OF THE COURT.

1. One term of this court shall be held annually on the first Monday of October and adjourned sessions on the first Monday of each month in the year. All sessions shall be held at San Francisco, unless otherwise especially ordered by the court.

2. The October, February, and May sessions shall be known as calendar sessions, and shall be sessions for the trial of all causes that shall have been placed upon the calendar in pursuance of rule 35.

3. A term of this court shall be held annually in the city of Seattle, in the state of Washington, and in the city of Portland, in the state of

Oregon. The Seattle term shall be held beginning upon the third Monday in September, and the term at Portland shall be held following the adjournment thereof.

All appeals and writs of error from the district courts for the districts of Washington, the transcripts of which shall be filed in this court between the first day of April and the first day of August of each year, shall be heard at said annual term in the city of Seattle, unless it be stipulated by the parties thereto that they be heard at San Francisco. All other appeals and writs of error from said district courts for those districts shall be heard at San Francisco, unless it be stipulated by the parties thereto that they be heard at said annual term in the city of Seattle. All appeals and writs of error from the district court for the district of Oregon, the transcripts of which shall be filed in this court between the first day of April and the first day of August of each year, shall be heard at said annual term in the city of Portland, unless it be stipulated by the parties thereto that they be heard at San Francisco. All other appeals and writs of error from said district court for that district shall be heard at San Francisco, unless it be stipulated by the parties thereto that they be heard at said annual term in the city of Portland. Appeals and writs of error from the district courts of the districts of Idaho and Montana and from the district courts of Alaska, may, upon the stipulation of the parties thereto, be heard at the annual term, and be held either at Seattle or Portland. All cases assigned for hearing at Seattle, and at Portland, shall be placed upon a calendar by the clerk to be called on the opening day of the term at Seattle and set for hearing during the Seattle and Portland terms, respectively.

RULE 37 (None in 3d, 6th and 7th Circuits).

1st

Appeals and writs of error from and to the District Court of the United States for the District of Porto Rico, and from the Supreme Court of the District of Porto Rico whenever by law they can be taken, shall be taken within six calendar months from the time when the right to such an appeal or writ of error accrues, and not afterwards, by filing a claim for the appeal in the registry of the court appealed from, or by suing out a writ of error from the Court of Appeals, or from the court or judge in Porto Rico, as the case may be.

2d

37. CITATIONS OF AUTHORITIES.

In the preparation of briefs any citations made from "Federal Cases" must be accompanied by the citation of the original report of the case, and where a citation is made from the American Bankruptcy Reports, citation in the Federal Reporter or United States Supreme Court Reports must also be given. If the case is not reported elsewhere than in Federal Cases or American Bankruptcy Reports, the fact must be so stated.

4th

The foregoing rules shall be in force on and after April 1st, 1912.

Since April 1st, 1912, another rule has been added in the 4th circuit, numbered 38.

5th

37. WRITS OF ERROR IN CRIMINAL CASES.

1. Writs of error to review criminal cases tried in any district or circuit court of the United States within this circuit, which may be reviewed under the provisions of the act of March 3, 1891, creating this court, and the act of Congress amendatory thereof, approved January 20, 1897, may be allowed in term time or in vacation by the circuit justice assigned to this circuit by either of the circuit judges, or by any district judge who presided on the trial, and the proper security be taken, and the citation be signed by him, and he may also grant a *supersedeas* and stay of execution or proceedings pending the determination of such writ of error.

2. Where such writ of error is allowed in any criminal case as aforesaid, the circuit court or district court, before which the accused was tried, or the trial judge, or the circuit justice assigned to the circuit, or either of the circuit judges, shall have the power, after the citation has been duly served, to admit the accused to bail in such amount as may be fixed, such bail bond to be, as near as may be, in the form prescribed in the Appendix to these rules. (Adopted June 11, 1897.)

APPENDIX TO RULE 37 (5th Circuit).

(Form of Appearance Bond on Writ of Error in Criminal Cases.)

KNOW ALL MEN BY THESE PRESENTS:

That we, ——, as principal, and ——, as sureties, are held and firmly bound unto the United States of America in the full and just sum of —— dollars, to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this —— day of ——, in the year of our Lord one thousand nine hundred and ——.

Whereas, lately at the —— term, A. D. 19—, of the —— court of the United States for the —— district of ——, in a suit pending in said court, between the United States of America, plaintiff, and ——, defendant, a judgment and sentence was rendered against the said ——, and the said —— has obtained a writ of error from the United States Circuit Court of Appeals for the Fifth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Fifth Circuit, at the City of New Orleans, Louisiana, thirty days from and after the date of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said —— shall appear in the United States Circuit Court of Appeals for the Fifth Circuit, on the first day of the next term thereof, to be held at the city of ——, on the first Monday in ——, A. D. 19—, and from day to day thereafter during said term, and from term to term, and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Fifth Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of the said —— court against him shall be affirmed by the said United States Circuit Court of Appeals for the Fifth Circuit then the above obligation to be void, else to remain in full force, virtue and effect.

—— [Seal]
—— [Seal]
—— [Seal]

Approved:

——

Judge of the ——

8th

37. ORDER OF COURT.

1. Before the filing of a petition to revise, the same shall be presented to the court, or one of the circuit judges, for leave to file the same and for an order fixing the return day to the notice required by law.

2. When such petition is accompanied by a written consent that the petition to revise may be filed and a waiver by the respondent or respondents, or their counsel, of such notice, no notice will be issued. In such cases the case will be docketed by the clerk.

9th

37. PHOTOGRAPH OF CHINESE TO BE ATTACHED TO BAIL BOND.

Whenever, in cases of deportation of Chinese, the defendant be admitted to bail pending appeal before the bond be approved and the party released from custody, a photograph of the defendant shall be attached to said bond.

This concludes the general rules in the 9th circuit. Admiralty Rules follow addenda to rule 45, 8th circuit.

RULE 38 (2d, 4th, 5th and 8th Circuits Only).

2d

PETITIONS TO REVIEW IN BANKRUPTCY.

Petitions to review orders in bankruptcy filed under the provisions of § 24b of the bankruptcy act must be filed and served within ten days after the entry of the order sought to be reviewed, and a transcript of the record of the proceedings in the bankruptcy court of the matter to be reviewed must be filed and the cause docketed within thirty days thereafter, but the judge of the bankruptcy court may for good cause shown enlarge the time for filing the petition or record, the order of enlargement to be made and filed with the clerk of the District court before the expiration of the times hereby limited for filing the petition and record respectively, and to be transmitted to this court with the transcript of record.

This concludes the general rules in the 2d circuit. Admiralty Rules follow addenda to rule 45, 8th circuit.

4th

On and after February 1, 1913, the contents of transcripts of record on appeal in equity and admiralty causes and on appeal (as distinguished

from petitions for revision) in bankruptcy causes, shall be governed by rules 75, 76, and 77 of the Rules of Practice for the Courts of Equity of the United States, promulgated by the Supreme Court of the United States November 4, 1912, which rules are as follows: [See Equity Rules, *post.*]

This concludes the rules in the 4th circuit.

5th

38. BANKRUPTCY.

Petitions to superintend and revise under clause "b," Section 24, Bankruptcy Law, shall be filed within thirty days from the date of the proceeding sought to be revised, but shall not operate as a *supersedeas* unless upon order of the Judge who passed the order in question or one of the Judges of this Court. (Adopted Feb. 25, 1916.)

This concludes the rules in the fifth circuit.

8th

38. NOTICE.

The notice to be given, as provided by law, shall be issued by the clerk of this court, under the seal thereof, and shall be addressed to the respondent or respondents and be served by the marshal unless an acknowledgment or acceptance of services thereof is made by the respondent or respondents, or their counsel.

4th

INSTRUCTIONS AS TO TAKING APPEALS, SUING OUT WRITS OF ERROR, MAKING UP RECORDS, ETC.

METHOD OF TAKING APPEALS.

Writs of error and citations are no longer made returnable to the *term day* of the appellate court, but are made returnable not exceeding *forty* days from the day of signing the citation, whether that day, which is the *return day,* fall in vacation or in term time; and the record must be filed in the clerk's office of this court on or before the *return day,* unless the time be enlarged as provided in § 1 of rule 16, and § 6 of rule 23. In that case the order of enlargement must be filed with the clerk of this court.

Rule 11, entitled "Assignment of Errors," requires the plaintiff in error, or appellant, to file with the *court below,* with his *petition* for the writ of error or appeal, an assignment of errors. Appeals and writs of error should be prayed for by *petition in writing* addressed to the *court below,* or to the judge in vacation, who allows the writ or the appeal, by an order in writing, approves the appeal or *supersedeas* bond, and signs the citation.

In cases brought up by writ of error from the district court, *the clerk of the district court,* or the clerk of this court, issues the writ of error, which writ fixes the *return day,* and the citation should bear the same *return day.* But in cases of appeal (in admiralty or in equity), the citation alone fixes the *return day.*

All appeals, therefore, whether by writ of error or appeal, should hereafter be taken in the following manner:

1. Petition in writing for the appeal, or writ of error, addressed to the court below, or the judge thereof in vacation.

2. The petition must be accompanied with an assignment of errors, and a prayer for reversal.

3. Appeal or writ of error bond, approval thereof, and the signing of the citation by the judge allowing the appeal or writ.

4. Order in writing of the judge allowing the writ of error or appeal.

5. Issuing the writ of error by the *clerk of the district court* or of this court.

6. In case it is desired to have the writ of error issued by the clerk of this court, a certified copy of the petition and order allowing the writ, under the seal of the court with a fee of five dollars for issuing it, must be transmitted to the clerk of this court, and the writ will be issued and forwarded to the clerk of the court below.

All of the above papers and proceedings should be filed by the clerk of the lower court. The writ of error and the citation, the originals of which, after having been duly served, must be certified up to this court as required by § 7 of rule 14. (For service of writ of error, see § 1007, R. S.)

In cases brought up by petitions to superintend and revise in bankruptcy, see rule 36.

Rules of this court, blank writs of error, appeals and *supersedeas* bonds, citations, and orders of appearance may be had of the clerks of the lower courts or of the clerk of this court upon application.

MAKING UP RECORDS.

In making up a transcript of the record, clerks are requested to make a *distinct title or heading to each paper or proceeding copied into the record, with the date of filing the same, or the date of such proceeding* and to write upon but one side of the paper in a clear, legible hand. And a *complete index of all the papers and proceedings should be made in their chronological order and attached to the record at the beginning of it.* Names of witnesses should be written at the top of each page of their testimony.

In order to have uniformity, records should be commenced with the style and the term of the court at which the *judgment* or *decree* is entered after the following form:

The United States of America,

—— District of ——, to wit:

At a District Court of the United States for the —— District of ——, begun and held at the Court-house in the city of ——, on the first Monday of —— being the —— day of the same month, in the year of our Lord one thousand, nine hundred and ——.

Present: The Honorable ——, District Judge, for the —— District of ——.

Among others were the following proceedings, to-wit:

A. B. vs. C. D. } In Equity [or] In Admiralty [or] At Law.

Bill of Complaint [or]
Libel [or]
Declaration [or Complaint]
Filed ——, 191— [date of filing]."

[Copy same with all *material* indorsements, and any accompanying papers and exhibits, and so on with every paper or proceeding in the case.]

As to the general order of making up a record, the following examples are given:

IN EQUITY.

1. Style of Court as Above.
2. Bill of Complaint, etc.
3. Process.
4. Marshal's Return.
5. Answer.
6. Replication.
7. Testimony and Exhibits for Complainant.
8. Testimony and Exhibits for Defendant.
9. Testimony and Exhibits in Rebuttal.
10. Opinion.
11. Decree.
12. Assignment of Errors.

IN ADMIRALTY.

1. Style of Court as Above.
2. Libel.
3. Process.
4. Marshal's Return.
5. Claim.
6. Stipulation.
7. Answer.
8. Testimony and Exhibits for Libelant.
9. Testimony and Exhibits for Respondent.
10. Testimony and Exhibits in Rebuttal.
11. Opinion.
12. Decree.
13. Assignment of Errors.

AT LAW.

1. Style of Court as Above.
2. Declaration.
3. Process.
4. Marshal's Return.
5. Plea or Demurrer, etc.
6. Joining of Issue.
7. Impaneling Jury.
8. Verdict.
9. Judgment.
10. Bill of Exceptions.
11. Assignment of Errors.

Form of Memorandum to be Inserted in a Common-law Case as Provided by Sec. 7 of Rule 14.

(1) Petition for writ of error filed —— day of ——, 19—.
(2) Writ of error granted —— day of ——, 19—.
(3) Writ of error issued —— day of ——, 19—.
(4) Copy of writ of error lodged for adverse party —— day of ——, 19—.
(5) Writ of error bond: Dated —— day of ——, 19—.
Penalty $——.
Obligors: ——.
_____
_____
_____
Condition for costs and damages (or for costs).
(6) Citation. Dated —— day of ——, 19—.
Return. Dated —— day of ——, 19—.
Or waiver of service. Dated —— day of ——, 19—.

Note: Similar memorandum *mutatis mutandis* to be used in admiralty and equity cases.

The petition for writ of error or appeal, the order granting writ of error or appeal, the writ of error, the appeal bond, the citation, the return of service or waiver of service should not be copied into the record, but the originals thereof shall be sent up and accompany the transcript of the record.

In transcribing bills of exceptions into the record in cases at law, clerks will carefully inspect such bills of exceptions and wherever the words "here insert," occur, the paper or matter called for should be bodily incorporated into the record at that place.

In making up records in admiralty cases, the following should be omitted (see rule 52 of the Supreme Court in Admiralty):

1. The continuances.

2. All motions, rules, and orders not excepted to which are merely preparatory for trial.

3. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the district court was founded on some one or more of these; in which case, so much of either of them as may be involved in the exceptions shall be set out. In all other cases it shall be sufficient to give the name of the witness and to copy the interrogatories and answers, and to state the name of the commissioner and the place where and the date when the deposition was sworn to, and in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

FORM FOR THE COVER OF A TRANSCRIPT OF THE RECORD.

TRANSCRIPT OF THE RECORD.

United States Circuit Court of Appeals.

Fourth Circuit.

No. ——.

——, Plaintiff in Error, or Appellant, or Petitioner,

versus

——, Defendant in Error, or Appellee, or Respondent.

In error to (or appeal from or on petition for review from) the District Court of the United States for the —— District of ——, at ——.

DOCKETING CASES AND PRINTING RECORDS.

Upon a record being filed, the case is docketed and is put upon the calendar for argument at the next term, or adjourned term, occurring thereafter, provided the record has been printed and copies thereof are delivered to opposing counsel twenty days before the said term or adjourned term, as provided in sec. 2, rule 17.

Clerk or counsel transmitting a record to this court must accompany the same with an order of appearance for the appellant or plaintiff in error, and also with a deposit of $25 for account of his costs to accrue in this court, and the names and addresses of the attorneys on both sides.

The clerk of this court will immediately upon a transcript of the record being filed under rule 23, send to the counsel an estimate of the cost of printing, supervising fees, etc., which amount must be deposited, either in cash or by New York exchange, with the clerk within ten days after notice. See rule 23.

It is important that records should be made up and forwarded to this office as promptly as possible after the appeal or writ of error is allowed, and not held until the near approach of the next term.

Defendants in error, appellees, or respondents are required, at the time of entering their appearance by attorney, to make a deposit of $25 for account of costs to be incurred by them in this court.

Deposits for costs are required on both sides of a case, and the surplus of such deposits, if any, will be refunded to each side making the deposits when the case is decided and at the time the mandate is transmitted to the lower court. The winning party collects the costs incurred by and adjudged to him, together with his attorney's docket fee, in the lower court upon the mandate and not from this office. The mandate will show the amount the winning party is entitled to so collect.

RULE 39 (2d and 8th Circuits Only).

—— 2d —— —— —— —— —— 8th ——

39. ADDING CASES TO GENERAL CALENDAR.

When the record in any cause has been printed and filed with the clerk, the parties may file a stipulation that the cause be added to the general calendar. If such stipulation be filed prior to the first Monday in March in any term, the cause will be added to the general calendar for that term without a motion therefor being made in open court. [This ends the general rules in the 2d circuit. The Admiralty Rules, 2d circuit, appear *post*.]

RESPONSE.

The response to the petition, when the respondent elects to make a written response, shall be filed within thirty days after the service of the notice of the filing of a waiver thereof.

RULE 40 (8th Circuit Only).

—— —— —— —— —— —— —— 8th ——

PRINTING OF RECORD.

1. The clerk shall cause the petition and exhibits thereto, if any, and the order, notice, and response, if any, to be printed as soon as convenient after the response is filed or the time for filing such response has expired and shall distribute the printed copies of same to counsel for the respective parties, as soon as the same are printed.

RULE 41 (8th Circuit Only).

—— —— —— —— —— —— —— 8th ——

BRIEFS AND ARGUMENTS.

Twenty copies of the brief and argument in behalf of the petitioner shall be printed and filed twenty days before the day set for the hearing and twenty copies of the brief and argument for the respondent or respondents shall be printed and filed eight days before the day of hearing.

RULE 42 (8th Circuit Only).

—— —— —— —— —— —— —— 8th ——

HEARING.

1. Petitions to revise filed in vacation, shall be assigned by the clerk for hearing in their regular order at the next session or term of the court in the same manner as appeals and writs of error in other cases.

2. Petitions to revise filed during a session of the court, when a sufficient showing or urgency is presented, may be set for hearing at that term and upon such terms and conditions as the court may direct.

3. Petitions to revise assigned by the clerk in their regular order as provided in section one of this rule, when such assignment is for a day near the close of the session, may be advanced by order of the court and set for an earlier day, upon good cause shown therefor by either of the parties.

RULE 43 (8th Circuit Only).

—— —— —— —— —— —— —— 8th ——

COSTS.

1. The costs and fees now provided by law in cases upon appeal or writ of error, shall, so far as the same are applicable, be taxed on petitions to revise.

2. Upon the determination of a petition to revise such order as to costs will be made as the court may deem necessary.

RULE 44 (8th Circuit Only).

—— —— —— —— —— —— —— 8th ——

PROCEDENDO.

1. In all cases on a petition to revise wherein the action or decree of the district court, complained of, is disapproved by this court, the clerk shall, at the expiration of thirty days from and after the date of entering the decree in this court, issue process in the nature of a *procedendo* to the said district court for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such district court in conformity with the decree of this court.

2. In all cases on petition to revise, wherein the action or decree of the district court, complained of, is approved and confirmed, or said petition dismissed, by this court, the clerk shall at the expiration of thirty days certify a copy of such decree to the district court.

RULE 45 (8th Circuit Only).

— — — — — — — 8th —

APPEALS AND WRITS OF ERROR IN BANKRUPTCY CASES.

1. The appeals and writs of error provided for by § 25 of the bankruptcy law, approved July 1st, 1898, shall be governed by the same rules and regulations as to costs and procedure as are provided by this court for appeals and writs of error in other cases.

ADDENDA.

8th

[Form of Writ of Error for use in the United States Circuit Court of Appeals, Eighth Circuit.]

United States of America, ss.

The President of the United States of America,

To the Honorable Judges of the [1] —— Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said —— Court, before you, at the —— Term, 19—, thereof, between [2] —— a manifest error hath happened, to the great damage of the said [3] —— as by —— complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the [4] ——day of ——, 19—, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

1 Here insert correct name of the court to which the writ is addressed and whose judgment is to be reviewed.

2 Here insert correct style of cause showing who was plaintiff and who defendant in court below.

3 Here insert name of party who sues out writ of error.

4 Rule XIV, subdivision 5, requires writs of error and appeals to be made returnable sixty days after citation is signed.

This blank must be filled accordingly, naming a day not more than sixty days after the date of the citation.

Witness, the Honorable ——, Chief Justice of the United States, this —— day of —— in the year of our Lord one thousand nine hundred ——.

Issued at office in —— with the seal of the [5] —— and dated as aforesaid.

——, Clerk of ——

Allowed by

——,

Judge.

[Form of Return to be indorsed on Writ of Error by the Clerk of the Court to which the Writ is addressed.]

United States of America,—ss.

In obedience to the command of the within Writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of [6] ——

——, Clerk of ——.

[5] This blank should be so filled as to show whether the writ is issued by the clerk of a United States district court or by the clerk of the circuit court of appeals.

[6] Here describe the court to which the writ is addressed.

[Form of Citation.]

United States of America.

To ——, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the —— Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to [1] —— filed in the Clerk's Office of the [2] —— wherein —— is [3] —— and you are [4] ——, to show cause, if any there be, why the [5] —— rendered against the said [6] —— as in said [7] —— mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable ——, Judge of —— this —— day of ——, A. D. 19—.

——, Judge of ——.

[1] Insert (a writ of error) or (an appeal allowed and).

[2] Insert name of court to which writ of error is addressed, or from which appeal is allowed.

[3] Insert plaintiff in error or appellant.

[4] Insert defendant in error or appellee.

[5] Insert judgment or decree.

[6] Insert plaintiff in error or appellant.

[7] Insert writ of error or appeal.

[Form of Supersedeas or Cost Bond.]

KNOW ALL MEN BY THESE PRESENTS:

That we, —— are held and firmly bound unto —— in the full and just sum of —— to be paid to the said —— heirs, executors, administrators, successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents. Sealed with our seals, and dated this —— day of ——, in the year of our Lord one thousand nine hundred ——.

WHEREAS, lately at the —— term of the —— in a suit depending in said Court between ——, plaintiff, and ——, defendant, —— was rendered against the said —— and the said —— has obtained —— of the said Court to reverse the —— in the aforesaid suit, and a citation directed to the said —— citing and admonishing —— to be and appear in the United States Circuit Court of Appeals for the —— Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said —— shall prosecute said —— to effect, and answer all damages and costs if —— fail to make good —— plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

—— (Seal)
—— (Seal)
—— (Seal)

Approved by

——.

(The foregoing bond and citation is adapted for appeals in equity cases as well as in cases of writs of error in actions at law.)

[Form of Appearance Bond on Writ of Error in Criminal Cases.]

KNOW ALL MEN BY THESE PRESENTS:

That we, —— as principal, and —— as sureties, are held and firmly bound unto the United States of America in the full and just sum of —— Dollars, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this —— day of —— in the year of our Lord, One Thousand Nine Hundred ——.

WHEREAS, lately at the —— Term, A. D. 19—, of the —— Court of the United States for the —— District of ——, in a suit depending in said Court between the United States of America, plaintiff, and ——, defendant, a judgment and sentence was rendered against the said —— and the said —— ha— obtained a writ of error from the United States Circuit Court

of Appeals for the Eighth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said —— shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Eighth Circuit on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his said writ of error and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Eighth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed or the writ of error or appeal is dismissed; and if he shall appear for trial in the —— Court of the United States for the —— District of —— on such day or days as may be appointed for a retrial by said —— Court and abide by and obey all orders made by said Court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the —— Circuit; then the above obligation to be void, otherwise to remain in full force, virtue and effect.

—— (Seal)
—— (Seal)
—— (Seal)

Approved:

——, Judge of the ——.

RULES OF THE CIRCUIT COURTS OF APPEALS IN ADMIRALTY.

In the first, third, fourth, fifth, seventh, and eighth circuits these rules are the same as provided in General Admiralty Rule No. 52 of the supreme court, with the addition in the first circuit of §§ 6 and 7 of rule 14 of the C. C. A.

In the second and ninth circuits rules 1, 2, 3, 4, 5, 6, 8, 10, and 11 are the same, rules 7, 9 and 12 are different, as shown below, and in the second circuit, rules 13 to 19, inclusive, are additional to the rules of the ninth circuit.

RULE 1.*

— 2d — — — — — — 9th

APPEALS AND NEW PLEADINGS.

An appeal to the Circuit Court of Appeals shall be taken by filing in the office of the clerk of the District Court, and serving on the proctor of the adverse party a notice signed by the appellant or his proctor that the party appeals to the Circuit Court of Appeals from the decree complained of.

The appeal shall be heard on the pleadings and evidence in the District Court, unless the Appellate Court, on motion, otherwise order.

*This rule so far modifies rule 11 of the General Rules that a petition for an appeal and the allowance thereof is not required in an admiralty case, nor is the assignment of errors required to be filed with notice of appeal. The assignment of errors must, however, be sent up to the appellate court with the apostles, as required in rule 4 of the Admiralty Rules. (Kenney v. Louie, No. 939. Motion to dismiss appeal denied, May 6, 1903.)

RULE 2.

— 2d — — — — — — 9th

NOTICE AND BOND.

Sec. 1. When a notice of appeal is served, the appellant shall file in the clerk's office of the District Court a bond for costs of the appeal,

with sufficient surety in the sum of $250, conditioned that the appellant shall prosecute his appeal to effect and pay the costs, if the appeal is not sustained. Such security shall be given within ten days after filing the notice, or the appeal shall be deemed abandoned, and the decree of the court below enforced, unless otherwise ordered by a judge of this court.

Sec. 2. And if the appellant desires to stay the execution of the decree of the court below, the bond which he shall give shall be a bond with sufficient surety in such further sum as the judge of the District Court or a judge of this court shall order, conditioned that he will abide by and perform whatever decree may be rendered by this court in the cause, or on the mandate of this court by the court below.

Sec. 3. The appellant shall, on filing either of such bonds, give notice of such filing, and of the names and residences of the sureties, and if the appellee, within two days, excepts to the sureties they shall justify, on notice, within two days after such exception.

RULE 3.

—— 2d —— —— —— —— —— —— 9th

REVIEW IN PART ONLY.

The appellant may also, at his option, state in his notice of appeal that he desires only to review one or more questions involved in the cause, which questions must be clearly and succinctly stated; and he shall be concluded in this behalf by such notice, and the review upon such an appeal shall be limited to such question or questions.

RULE 4.

—— 2d —— —— —— —— —— —— 9th

APOSTLES ON APPEAL TO CONTAIN.

Sec. 1. The apostles, on an appeal to this court, shall, in cases where a general notice of appeal is served, consist of the following:

(1) A caption exhibiting the proper style of the court and the title of the cause, and a statement showing the time of the commencement of the suit; the names of the parties, setting forth the original parties and those who have become parties before the appeal, if any change has taken place; the several dates when the respective pleadings were filed, whether or not the defendant was arrested, or bail taken, or properly attached,

or arrested and if so, an account of the proceedings thereunder; the time when the trial was had, and the name of the judge hearing the same; whether or not any question was referred to a commissioner, or commissioners, and if so, the result of the proceedings and report thereon; the date of the entry of the interlocutory and final decree; and the date when the notice of appeal was filed.

(2) All the pleadings, with the exhibit annexed thereto.

(3) All the testimony and other proofs adduced in the cause.

(4) The interlocutory decree and any order of the court which appellant may desire to have reviewed on the appeal.

(5) Any report of a commissioner or commissioners to which exception may have been taken, with the order or orders of the court respecting the same, and the exceptions to the report, and so much of the testimony taken in the proceedings as may be necessary to a review of the exceptions.

(6) All opinions of the court, whether upon interlocutory questions or finally deciding the cause.

(7) The final decree, and the notice of appeal; and

(8) The assignments of error.

Sec. 2. All other papers shall be omitted unless otherwise ordered by the judge who heard the cause.

Sec. 3. Where the appellant shall appeal specially and seek only to review one or more questions involved in the cause, the apostles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal.

RULE 5.

—— 2d —— —— —— —— —— —— 9th

CERTIFYING RECORDS.

The appellant shall, within thirty days after giving notice of appeal, procure to be filed in this court the apostles certified by the clerk of the district court, or in case of a special appeal, the stipulated record, with the certification by the said clerk of all papers contained therein on file in his office.

RULE 6.

— 2d — — — — — — 9th

IF APPEARANCE OF APPELLEE NOT ENTERED.

If the appellee does not cause his appearance to be entered in this court within ten days after service on his proctor of notice that the apostles are filed in this court, the appellant may proceed *ex parte* in the cause, and have such decree as the nature of the case may demand.

RULE 7.

— 2d — — — — — — 9th

NEW ALLEGATIONS, ETC.

Upon sufficient cause shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations or pray different relief or interpose a new defense, or take new proofs. ["Applications for such leave must be made within fifteen days after the filing of the apostles and upon at least four days' notice to the adverse party," 2d circuit.] ["Application for such leave may be made at any time after the perfecting of the appeal to this court, and within fifteen days after the filing in this court of the apostles, and upon at least four days' notice to the adverse party or his attorney of record," 9th circuit.]

RULE 8.

— 2d — — — — — — 9th

NEW PLEADINGS—NEW TESTIMONY.

If leave be granted to make new allegations, pray different relief or interpose a new defense, the moving party shall, within ten days thereafter, serve such new pleading, duly verified, on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath.

If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter testimony within twenty days after such filing.

RULE 9.

—— 2d —— —— —— —— —— —— see below

NEW TESTIMONY—HOW TAKEN.

Such testimony shall be taken by deposition before any United States commissioner, or notary public, upon reasonable notice in writing given to the opposite party; or by commission issued out of this court with interrogatories annexed. Upon proper cause shown, the court may grant an open commission.

9th

Such testimony shall be taken by deposition before the clerk of this court, or any United States commissioner, or any clerk of a district court of the United States, or any notary public upon reasonable notice, in writing, given to the opposite party or his attorney of record, either in this court or in the court below, which notice must state the name or names of the witness or witnesses and the time and place of taking his or their deposition or depositions; or by commission issued out of this court with interrogatories annexed. Upon sufficient cause shown, the court may grant an open commission.

RULE 10.

—— 2d —— —— —— —— —— —— 9th

PRINTING NEW PLEADINGS AND TESTIMONY.

If new pleadings are filed or testimony taken in this court, the same shall also be printed and furnished by the clerk, as in the 23d General Rule provided.

RULE 11.

—— 2d —— —— —— —— —— —— 9th

MOTIONS.

All motions shall be made upon at least four days' notice.

RULE 12.

—— 2d —— —— —— —— —— —— see below

WRIT OF INHIBITION.

A writ of inhibition may be awarded by this court on motion of the appellant to stay proceedings in the court below when circumstances require.

9th

EXTENSION OF TIME.

The time specified in the foregoing rules for any proceeding may be extended by order of a judge of this court.

These rules shall go into effect on the first Monday of October, 1900.

RULE 13.

2d

MANDAMUS.

A *mandamus* may, in like manner, be obtained to compel a return of the apostles when unreasonably delayed by the clerk, or court below.

RULE 14.

2d

CASES TO BE PLACED ON DOCKET.

Each case shall be placed on the docket as soon as the printing of the apostles is completed by the clerk.

RULE 15.

2d

BRIEFS.

Sec. 1. Counsel for the appellant shall file with the clerk of this court, at least twenty days before the case is called for argument ten copies of a printed brief, and shall at the same time serve two copies thereof on the proctors of record, or on the counsel engaged upon the opposite side. This brief shall contain in order here stated:

(1) A statement of the nature of the appeal, the court from which the appeal is taken, and a concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they were raised.

(2) If the pleadings have been amended in this court or new proofs have been taken, it shall be stated what amendments have been made and in what respect the new proofs have changed, or tended to change, the case as made in the court below.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the folios of the record or to the numbers of the questions, and the authorities relied upon in support of each point.

Sec. 2. The counsel for the appellee shall file with the clerk of the court ten printed copies of his brief and serve two copies thereof at least ten days before the case is called for argument. His brief shall be of a like character with that required of the appellant, and in case new proofs are taken on behalf of the appellee, the brief shall so state and wherein the new proofs have changed the case as made in the court below.

Sec. 3. The reasonable expense of printing briefs shall be an item of taxable costs.

RULE 16.

—— 2d —— —— —— —— —— —— ——

MANDATES.

The decrees of this court shall direct that a mandate issue to the court below.

RULE 17.

—— 2d —— —— —— —— —— —— ——

EXTENSION OF TIME.

The time specified in the foregoing rule for any proceeding may be extended by order of a judge of this court.

RULE 18.

—— 2d —— —— —— —— —— —— ——

WHEN RULES OF DISTRICT COURTS TO APPLY.

In all matters in civil causes of admiralty and maritime jurisdiction not expressly provided for by the foregoing rules of this court, the rules of practice of the district court of the district in which the cause was decided, being in force at the time (not being inconsistent with these rules), will be adopted so far as may seem proper.

RULE 19.

— 2d — — — — — — —

WHAT GENERAL RULES SHALL BE DEEMED ADMIRALTY RULES.

The following of the General Rules of this court, and no others, shall be deemed admiralty rules, viz.: Rules 3, 4, 5, 6, 7, 9, 11, 12; sec. 4 of rule 14; rules 15, 16, 17, 18, 19, 20, 21, 22, 23; sec. 5 of General Rule 24; rules 25, 26, 27, 28, 29; sec. 4 of rule 30; rules 31, 32, 34, 36 and 37.

EQUITY RULES IN FORCE FEBRUARY 1, 1913, COMPARED WITH OLD EQUITY RULES.

(Official Index at end of Rules. Also Indexed in General Index showing Sections of Text where Treated.

Numerical Table of Rules referring to sections of text where rules are quoted or referred to, may be found at p. 1035. *post.*

TABLE OF OLD EQUITY RULES SHOWING WHAT HAVE BEEN INCORPORATED AND WHAT OMITTED IN THE NEW EQUITY RULES.

Those marked with a star (*) are identical with the new rule indicated.

Old	New
1	1 par. 1.
2	2 and See 6.
3	1 par. 2.
4	4–3–6.
5	5.
6	Out See 6.
7	7* substantially.
8	8.
9	9*
10	11* substantially.
11	12.
12	12.
13	13*
14	14* substantially.
15	15*
16	Out See 3.
17	Out See 16 and 12.
18	16 and 17 and 58.
19	17.
20	25 par. 1.
21	25 pars 1–2–3–5.
22	25 par. 4.
23	25 par. 5.
24	24.
25	Out.
26	21.
27	Out See 21.
28	28 and 19.
29	28 and 19.
30	Out See 19.
31	Out See 29.
32	Out See 29.
33	Out See 29.
34	Out See 29.
35	Out See 29 and 28.
36	Out See 29.
37	Out See 29.
38	Out See 29.
39	Out See 29.
40	See 58.
41	Out See 58.
42	Out See 58.
43	Out See 58.
44	Out See 58.
45	Out See 31.
46	32* with time changed.
47	39.
48	38.
49	37.
50	41*
51	42*
52	43.
53	44.
54	40.
55	Out See 73.
56	45.
57	34.
58	35*
59	36.
60	Out See 19 and 30.
61	Abolished 33 and 21.
62	Out.
63	Out See 33.
64	Out See 33 and part 58.
65	Out.
66	Abolished 31.
67	See 58 and 46–49–51–52–53–47
68	54.
69	55 and 47.
70	47 and 54.
71	Out See 58.
72	Out See 30 and 58.
73	Out.
74	59.
75	60*
76	61*
77	62.
78	52 See 46.
79	63.
80	64*
81	65*
82	68.
83	66* with time changed.
84	67.
85	72.
86	71*
87	70*
88	69.
89	79.
90	Out See 79.
91	78*
92	10* substantially.
93	74.
94	27.

CORRESPONDING TABLE OF NEW RULES SHOWING FROM WHERE DRAWN IN THE OLD RULES AND WHAT ARE ENTIRELY NEW. THOSE MARKED WITH A STAR (*) ARE IDENTICAL WITH THE OLD RULE.

New Old
Par. 1—1-1.
Par. 2—1-3.
2— 2.
3— new. See 4.
4— 4.
5— 5.
6— new.
7— 7* substantially.
8— pt. new. 8.
9— 9*
10—92* substantially.
11—10* substantially.
12—11 and 12.
13—13*
14—14* substantially.
15—15*
16—18 first part.
17—19.
18—New.
19—28, 29 and 60 supersedes 30.
20—new.
21—new. See 26, 27, 61.
22—new.
23—new.
24—partly new. 24.
25
Par. 1—20.
" 2—21.
" 3, new.
" 4—22 pt.
" 5—pt. 21 and 23.
26—new.
27—94.
28—28 1st pt. 29 1st pt.
29—new superseding 31 to 40.
30—new. See 60. Supersedes 72.
31—new superseding 45 and 66.
32—46* with time changed.
33—new superseding 61, 63, 64.
34—new superseding 57.
35—58*
36—59.
37—new superseding 49.
38—48.

New Old
39—47.
40—54.
41—50*
42—51*
43—52 and pt. new.
44—53.
45—new superseding 56.
46—abolishing 67, 78.
47—new, pt. 67, pt. 69, pt. 70.
48—new.
49—new, pt. 67.
50—new.
51—new—last pt. from pt. 67.
52—pt. new. 78 1st pt. 67 pt.
53—67 pt.
54—68 and 70 superseded.
55—new superseding 69.
56—new.
57—new.
58—new pt. 18 2nd pt. Supersedes 40, 41, 42, 43, 44, 64, 67.
59—74.
60—75*
61—76*
62—77.
63—79.
64—80*
65—81*
66—83* with time changed.
67—84.
68—82.
69—88.
70—87*
71—86*
72—85.
73—new superseding 55.
74—93.
75—new.
76—new.
77—new.
78—91*
79—89 supersedes 90.
80—new.
81—new.

EQUITY RULES IN FORCE

FEBRUARY 1, 1913, COMPARED WITH THE OLD EQUITY RULES.

EXPLANATORY NOTE.

Matter contained in parentheses followed by a number indicates that such matter is the same as the old rule of that number except where changes are indicated by *note* numbers above the line of the text of the rule. Thus the first part of rule 1 is identical with old rule 1 except the word "district" followed by note number "1" in the new rule was "circuit" in old rule 1. The second part of rule 1 in parentheses is the same as part of old rule 3, and the last part of rule 1 in parentheses is new, as indicated in the note below.

Rule 1. District court always open for certain purposes—Orders at chambers. (The district[1] court, as courts of equity shall be deemed always open for the purpose of filing[2] any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.) (1.)

(Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings,) (pt. 3) (whenever the same are not grantable of course, according to the rules and practice of the court.) (New.)

1 Formerly "circuit."
2 Omits "bills, answers, and other."

Drawn from old rule 1, and part of old rule 3, but last sentence of rule is new.

The rule is identical with § 9, Judicial Code, except omits "admiralty and" after "district courts," and before "as courts of equity."

Rule 2. Clerk's office always open, except, etc. The clerk's office shall be open during business hours on all days, except Sundays and legal holidays, and the clerk shall be in attendance for the purpose of receiving and disposing of all motions, rules, orders and other proceedings which are grantable of course.

Drawn from old rule 2 which established the first Monday in the month as rule day. Rule day is now abolished. Motion day is provided for in rule 6, *post*.

Rule 3. Books kept by clerk and entries therein. The clerk shall keep a book known as "Equity Docket," in which he shall enter each suit, with a file number corresponding to the folio in the book. All papers and orders filed with the clerk in the suit, all process issued and returns made thereon, and all appearances, shall be noted briefly and chronologically in this book on the folio assigned to the suit and shall be marked with its file number.

The clerk shall also keep a book entitled "Order Book," in which shall be entered at length, in the order of their making, all orders made or passed by him as of course and also all orders made or passed by the judge in chambers.

He shall also keep an "Equity Journal," in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time.

Separate and suitable indices of the Equity Docket, Order Book and Equity Journal shall be kept by the clerk under the direction of the court.

New.—Old rule 4 provided for an "Order Book." Otherwise this is a new rule. Supersedes old rule 16.

Rule 4. Notice of orders. Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order.

New.—Superseding old rule 4, which provided the entry in the Order Book was sufficient notice to the parties, except in cases where personal or other notice is specially required or directed. The part as to mailing copies is new.

Rule 5. Motions grantable of course by clerk. (All motions and applications in the clerk's office for the issuing of mesne process or final process to enforce and execute decrees;[1] for taking bills *pro confesso;*[2] and for other proceedings in the clerk's office which do not[3] require any allowance or order of the court or of a judge, shall be deemed motions and applications grantable of course by the clerk; but the same may be

suspended, or altered, or rescinded by the judge[4] upon special cause shown.) (5.)

1 Omits "for filing bills, answers, pleas, demurrers and other pleadings; for making amendments to bills and answers."
2 Omits "for filing exceptions."
3 Omits "by the rules hereinafter described."
4 Omits "of the court."

Rule 6. Motion day. (Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district.) (New. Substituting "motion day" for the abolished "rule day.")

Rule 7. Process, mesne and final. (The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the[1] bill; and, unless otherwise provided in these rules or specially ordered by the court, a writ of attachment and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.) (7.)

1 Omits "exigency of."

Rule 8. Enforcement of final decrees. (Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the district[1] court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from

which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found a writ of sequestration shall issue against his estate, upon the return of *non est inventus,* to compel obedience to the decree.) (8. Identical.) (If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done, be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him.) (New.)

1 Circuit.

Rule 9. Writ of assistance. (When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.) (Identical 9.)

Rule 10. Decree for deficiency in foreclosures, etc. (In suits for the foreclosure of mortgages, or the enforcement of other liens), (new) (a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in rule 8 when the decree is solely for the payment of money.) (Substantially 92.)

Rule 11. Process in behalf of and against persons not parties. (Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may enforce obedience to such order by the same process as if he were a party; and every person, not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party.[1]) (10.)

1 The last three words of the old rule 10, "in the cause," are omitted.

Rule 12. Issue of subpoena—Time for answer. (Whenever a bill is filed, and not before, the clerk shall issue the process of subpoena thereon,) (11.) as of course, upon the application of the plaintiff, (which

shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof.) (New.) (At the bottom of the subpoena shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpoena against all the defendants.) (12.)

This rule combines old rules 11 and 12; the time for answering is changed because of the abolition of the rule day. Appearance day is abolished.

Rule 13. Manner of serving subpoena. (The service of all subpoenas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family.) (Identical 13.)

Rule 14. Alias subpoena. (Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to other[1] subpoenas[2] against such defendant, until due service is made.) (14.)

1 Changed from "another."
2 Omits "*toties quoties*."

Rule 15. Process, by whom served. (The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court or judge for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.) (Identical 15.)

Rule 16. Defendant to answer—Default—Decree pro confesso. (It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court,[1] to file his answer[2] or other defense (new) to the bill in the clerk's office within the time named in the subpoena as required by rule 12.[3] In default thereof the plaintiff may, at his election, take an order as the course[4] that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte*.) (1st pt. 18.)

1 Omits "on motion for that purpose."
2 Omits "plea, demurrer."
3 Changes "on the rule next succeeding that of his appearance."
4 Omits "enter an order . . . in the Order Book."

Rule 17. Decree pro confesso to be followed by final decree—Setting aside default. (When the bill is taken *pro confesso* the court may proceed to a[1] final decree at any time after the expiration of thirty days after the entry of the order[2] *pro confesso,* and such decree[3] shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit.[4] No such motion shall be granted, unless upon the payment of the costs of the plaintiff[5] up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct for the purpose of speeding the cause.) (19.)

1 Adds "final."
2 Omits, "to take the bill."
3 Omits, "rendered."
4 Omits, "of the defendant."
5 Omits, "in the suit."

Rule 18. Pleadings—Technical forms abrogated. (Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished.) (New.)

Rule 19. Amendments generally. (The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.) (28, 29, 60. Supersedes old rule 30.)

See rule 28, *post.*

Drawn from old rules 28, 29, and 60, which it supersedes. It also

Rule 20. Further and particular statement in pleading may be required. A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just.

New rule, drawn from order XIX, rule 7, English chancery practice.

As to object of particulars, see Speeding v. Fitzpatrick, 38 C. D. 413; Milbank v. Milbank, 1 Ch. 285.

Rule 21. Scandal and impertinence. (The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit.) (New. Abolishing the practice of taking exceptions for scandal and impertinence under old rules, 26, 27, 61. See Rule 33, *post.*)

Rule 22. Action at law erroneously begun as suit in equity—Transfer. (If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.) (New. Same as English practice under judicature act 1875.)

Rule 23. Matters ordinarily determinable at law, when arising in suit in equity to be disposed of therein. (If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court.) (New.)

Rule 24. Signature of counsel. (Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.) (24. Partly New.)

Rule 25. Bill of complaint—Contents. Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:

First, (the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.) (From 20.)

Second, (a short and plain statement of the grounds upon which the court's jurisdiction depends.) (From 21.)

Third, (a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.) (New.)

Fourth, (if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not

made parties—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.) (22. Partly.)

Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked. (From last pt. 21 and 23.)

Rule 26. Joinder of causes of action. (The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials.) (New.)

Rule 27. Stockholder's bill. (Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action,) (94) (or the reasons for not making such effort.) (New.)

Rule 28. Amendment of bill as of course. (The plaintiff may, as of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by the court or judge.) (From 28, 1st part.)

After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge. (From 29, 1st part.)

This rule, with rule 19 above, makes several changes in the practice as to amendments.

Rule 29. Defenses—How presented. (Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.) (New. Does away with old rules 3 to 39, inclusive.)

Rule 30. Answer—Contents—Counterclaim. (The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic or other person *non compos* and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims.) (New. Supersedes old rules 60 and 72.)

Rule 31. Reply—When required—When cause at issue. (Unless the answer assert a set-off or counterclaim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counterclaim the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counterclaim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counterclaim may be entered as in default of an answer to the bill.) (New. Supersedes old rules 45 and 66.)

Rule 32. Answer to amended bill. (In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days) (new) (after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon a default, the like proceedings may be had as upon an omission to put in an answer.) (46. Rule day being abolished, the only change of language in old rule 46 was that defining time.)

Rule 33. Testing sufficiency of defense. Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off or counterclaim, the plaintiff may, upon five days' notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amendable the court may allow an amendment upon terms, or strike out the matter. (New. Superseding old rules 61, 63, 64.)

Rule 34. Supplemental pleading. (Upon application of either party the court or judge, may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof.) (New. See old rule 57.)

Rule 35. Bills of revivor and supplemental bills—Form. (It shall not be necessary in any bill of revivor or supplemental bill to set forth

any of the statements in the original suit, unless the special circumstances of the case may require it.) (Identical 58.)

Rule 36. Officers before whom pleadings verified. Every pleading which is required to be sworn to by statute, or these rules, may be verified (before any justice or judge of any court of the United States, or of any state or territory, or of the District of Columbia, or any clerk of any court of the United States, or of any territory, or of the District of Columbia, or any notary public). (59. Omitting commissioners and masters in chancery. First part of the old rule read, "Every defendant may swear to his answer. . . . ")

Rule 37. Parties generally—Intervention. (Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.) (New. Superseding 49.)

Rule 38. Representatives of class. (When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.) (New. Drawn from old rule 48.)

Rule 39. Absence of persons who would be proper parties. (In all cases where it shall appear to the court that persons, who might otherwise be deemed[1] proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust

the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.) (47.)

1 Omits "necessary or."
See § 50, Judicial Code.

Rule 40. Nominal parties. (Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer,[1] but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.) (54.)

1 Omits "of his bill."

Rule 41. Suit to execute trusts of will—Heir as party. (In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.) (Identical 50.)

Rule 42. Joint and several demands. (In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.) (Identical 51.)

Rule 43. Defect of parties—Resisting objection. (Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may,[1] within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only,[2] and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order[3] to amend his bill by adding parties; but the court[4] shall be

at liberty to dismiss the bill,) (52.) (or to allow an amendment on such terms as justice may require.) (New.)

1 Omitted words, "shall be at liberty."
2 "And the purpose for which the same is set down shall be notified by an entry, to be made in the clerk's Order Book in form or to the effect following (that is to say): 'Set down on the defendant's objection for want of parties.'"
3 Omits, "for liberty."
4 Omits, "if it thinks fit."

Rule 44. Defect of parties—Tardy objection. (If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by[1] motion or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the court shall[2] be at liberty to make a decree saving the rights of the absent parties.) (53.)

1 Word "motion" substituted for "plea or answer."
2 "(if it shall think fit)" omitted.

Rule 45. Death of party—Revivor. (In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion, may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary.) (New. Superseding 56.)

Rule 46. Trial—Testimony usually taken in open court—Rulings on objections to evidence. (In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require.) (New. Abolishing the practice under 67.)

Rule 47. Depositions—To be taken in exceptional instances. (The court, upon application of either party, when allowed by statute,[1] or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires.) (New. Superseding 67, 69 and 70.)

[1] See new rule 54, *post.*

Rule 48. Testimony of expert witnesses in patent and trademark cases. In a case involving the validity or scope of a patent or trademark, the district court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavit shall not be used as evidence in the cause.

New. The probabilities are that this rule will make little change in patent and trademark cases, and that rule 46 will not be applied to these cases. Probably testimony will be largely taken as formerly, by resort to the first clause in rule 47, allowing depositions to be taken "for good and exceptional cause." The practice since these rules went into effect bears out the foregoing statute in our first edition.

Rule 49. Evidence taken before examiners, etc. (All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court. Depositions, whether upon oral examination before an examiner or like officer or otherwise, shall be taken

upon questions and answers reduced to writing, or in the form of narrative, and the witness shall be subject to cross and re-examination.) (New. See 67.)

Rule 50. Stenographer—Appointment—Fees. (When deemed necessary by the court or officer taking testimony, a stenographer may be appointed who shall take down testimony in shorthand and, if required, transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript.) (New.)

Rule 51. Evidence taken before examiners, etc. (Objections to the evidence, before an examiner or like officer, shall be in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate. The testimony of each witness, after being reduced to writing, (shall be read over to or by him,[1] and shall be signed by him in the presence of the officer:[2] Provided, That if the witness shall refuse to sign his[3] deposition so taken, the officer[4] shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal.[5] Objection to any question or questions shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevancy of the questions. The court shall have power, and it shall be its duty, to deal with the costs of incompetent and immaterial or irrelevant depositions, or parts of them, as may be just. (Substantially 67, last pt.)

1 "Him," for "the witness."
2 "Officer" instead of "of the parties or counsel, or such of them as may attend."
3 "His" instead of "the said."
4 "Officer" for "examiner."
5 Omitted "and the examiner may upon all examinations state any special matters to the court as he shall see fit."

Rule 52. Attendance of witnesses before commissioner, master or examiner. (Witnesses who live within the district, and whose testimony may be taken out of court by these rules,) (new) (may be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attend-

ance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in, the court.) (78, 1st part.)

(In case of refusal of witnesses to attend or be sworn or to answer any question put by the commissioner, master or) (new) (examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.) (67, pt.)

Rule 53. Notice of taking testimony before examiner, etc. (Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer[1] may fix by order in each case.) (67, pt.)

[1] "Court or officer" for "examiner."

Rule 54. Deposition under Rev. Stats. §§ 863, 865, 866, 867—Cross-examination. (After a cause is at issue, depositions may be taken as provided by §§ 863, 865, 866 and 867, Revised Statutes. But if in any case no notice has been given the opposite party of the time and place of taking the deposition, he shall, upon application and notice, be entitled to have the witness examined orally before the court), (new) (or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge under all the circumstances shall order.) (68 and 70 superseded.)

Rule 55. Deposition deemed published when filed. (Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published, unless otherwise ordered by the court.) (New. Superseding 69.)

Rule 56. On expiration of time for depositions, case goes on trial calendar. (After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further testimony by deposition shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his

deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give.) (New.)

Rule 57. Continuances. (After a cause shall be placed on the trial calendar it may be passed over to another day of the same term, by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion impose. Continuances beyond the term by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one.) (New.)

Rule 58. Discovery—Interrogatories—Inspection and production of documents—Admission of execution or genuineness. The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit.

Copies shall be filed for the use of the interrogated party and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party if there be no record solicitor.

Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully and the answers shall be in writing, under oath, and

signed by the party or corporate officer interrogated. Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

(The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.) (See 2nd pt. 18.)

By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable.

Supersedes 40, 41, 42, 43, 44, 64 and 2d pt. 18. Drawn from order XXXI, English practice.

Rule 59. Reference to master—Exceptional, not usual. (Save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it.) (New.) (When such a reference is made, the party at whose instance or for whose benefit it is made shall cause the order of reference to be presented to the master for a hearing[1] within twenty days succeeding the time when the reference was made, unless a longer time be specially granted by the court or judge; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.) (74.)

[1] Omitting "on or before next rule day," and substituting "within twenty days."

Rule 60. Proceedings before master. (Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the

same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte,* or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.) (Identical 75.)

Rule 61. Master's report—Documents identified but not set forth. (In the reports made by the master to the court, no part of any state of facts, account, charge, affidavit, deposition, examination, or answer brought in or used before him shall be stated or recited. But such state of facts, account, charge, affidavit, deposition, examination, or answer shall be identified, and referred to, so as to inform the court what state of facts, account, charge, affidavit, deposition, examination, or answer were so brought in or used.) (Identical 76.)

Rule 62. Powers of master. (The master shall regulate all the proceedings in every hearing before him, upon every reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce,* all witnesses produced by the parties before him,[1] or by deposition, according to the acts of Congress, or otherwise, as here provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.) (77.)

[1] Formerly read after note number to the word "provided" as follows: "and to order the examination of other witnesses to be taken under commission to be issued upon his certificate from the clerk's office, or by deposition, according to acts of Congress or otherwise, as hereinafter provided."

See Foote v. Silsby, 3 Blatchf. 507; Consolidated Fastener Co. v. Columbian Co., 85 Fed. 54; Bate Refrigerator Co. v. Gillette, 28 Fed. 673; White v. Railroad Co., 79 Fed. 113; Deitch v. Staub, 115 Fed. 309; Welling v. La Baw, 32 Fed. 293; Lull v. Clark, 20 Fed. 454.

Rule 63. Form of accounts before master. (All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce,* or upon interrogatories,[1] as the master shall direct.) (79.)

[1] Omitted "in the master's office, or by deposition."

Rule 64. Former deposition, etc., may be used before master. (All affidavits, depositions and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.) (Identical 80.)

Rule 65. Claimants before master examinable by him. (The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce,* or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.) (Identical 81.)

Rule 66. Return of master's report—Exceptions—Hearing. (The master, as soon as his report is ready, shall return the same into the clerk's office and the day of the return shall be entered by the clerk in the Equity Docket. The parties shall have twenty days[1] from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise.) (83.)

[1] Formerly "one month."

Rule 67. Costs on exceptions to master's report. (In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled, shall, for every exception overruled, pay five dollars costs to the other party, and for every exception allowed shall be entitled to the same costs.) (84, fixing the costs at five dollars.)

Rule 68. Appointment and compensation of masters. (*The district*[1] courts may appoint standing masters in chancery in their respective districts a majority of all[2] the judges thereof concurring in the appointment, and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master[3] shall be fixed by the district[1] court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.) (82.)

1 Formerly "circuit."
2 Formerly "both."
3 Omitted "in chancery for his services in any particular case."

Rule 69. Petition for rehearing. (Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the circuit court of appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.)

Identical with old rule 88, with the addition of the words, "circuit court of appeals."

See Giant Powder Co. v. Cal. Powder Co., 5 Fed. 197; McLeod v. New Albany, 66 Fed. 378; Brook v. Railroad Co., 102 U. S. 107, 26 L. Ed. 91.

Rule 70. Suits by or against incompetents. (Guardian *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable of suing for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami;* subject, however, to such orders as the court or judge may direct for the protection of infants and other persons.) (Identical 87.)

Rule 71. Form of decree. (In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the

report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard [or to be further heard, as the case may be] at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz." [Here insert the decree or order.] (Identical 86.)

Rule 72. Correction of clerical mistakes in orders and decrees. (Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before[1] the close of the term at which final decree is rendered, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.) (85.)

[1] Substitutes "the close of the term at which final decree is rendered" for the words, "an actual enrollment thereof."

Rule 73. Preliminary injunctions and temporary restraining orders. (No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office.) (New. Changing the practice under 55.)

Rule 74. Injunction pending appeal. (When an appeal from a final decree in an equity suit granting or dissolving an injunction is allowed

by a justice or a judge who took part in the decision of the cause he may, in his discretion, at the time of such allowance make an order suspending, modifying,[1] or restoring the injunction during the pendency of the appeal upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.) (93.)

[1] Add words following note number "or restoring."

Rule 75. Record on appeal—Reduction and preparation. (In case of appeal:

(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a *precipe* which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his *precipe* also within 10 days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

(b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his *precipe* under paragraph (a) of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least 10 days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge and if the statement be true, complete, and properly prepared, it shall be approved by the court or judge, and if it be not true, complete, or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

(c) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph (b) of this rule and shall be covered by the directions which the court or judge may give on the subject.) (New.)

Construction by Circuit Court of Appeals—Per Curiam. Motions recently decided and others now pending involving these rules justify a formal statement of our conclusions.

Rule 75 fixes no time within which the statement of evidence must be settled and filed in order to "become a part of the record for the purposes of the appeal." Undoubtedly, the better practice is to complete this step before claiming, or, at least, before perfecting the appeal, and if the term expires before the final statement of evidence is filed, to enter an order carrying this matter into the next term; but where appeals are required within thirty days, or even within ten days, the time may be wholly insufficient to perfect the record in this respect, and the expiration of the term may very commonly be forgotten, particularly as it has never been a matter of importance in equity appeals. It is said that the completing of this statement of evidence corresponds to the settling of a bill of exceptions at law, and the familiar rule is invoked that a purported bill of exceptions which was not settled within the trial term or pursuant to a reservation during the trial term is a nullity and will be stricken from the record. We are not satisfied that the analogy is close enough to justify the incorporation of this harsh rule into the practice pursuant to rule 75, which must have been adopted with due consideration of the existing practice by which appeals were claimed and perfected regardless of the expiration of terms; and we conclude that the trial court has power to approve and direct the filing of the statement of evidence, although the term has expired when the decree was rendered, and although no order was entered carrying the subject-matter over until the next term.

The same general view leads also to the conclusion that the perfecting of an appeal by the approval of a bond and the signing of citation does not deprive the trial court of jurisdiction to settle the evidence. It is true that for general purposes, jurisdiction over the cause is thereby ended, and that the shaping of this statement of evidence involves the decision by the judge of disputed claims; but, upon the whole, the proceeding is rather ministerial, and it sufficiently pertains to the making of the return to the appeal so that we think a statement of evidence

so approved and filed cannot, for that reason alone, be stricken from the record.

Instances occur where rule 75 is wholly disregarded, and the return to the appeal includes the evidence in full, in accordance with the old practice, and we are asked to dismiss appeals where the record is so made up, or to strike out the statement of evidence, thereby leading to an affirmance. To send the record back for correction in this respect involves delay and the exercise of uncertain power; while to dismiss the appeal or to strike all the evidence from the record may cause the loss of substantial rights through the blunder in practice by counsel. This drastic remedy may prove to be necessary in some cases, but we are reluctant to apply it now. The enforcement of both rules rests, primarily, upon the district judges, whose obligation we pointed out in Pittsburgh etc. R. Co. v. Glinn, 208 Fed. 989, 126 C. C. A. 77, and we have no doubt that they will observe the new practice when approving a statement of evidence or bill of exceptions; but in equity appeals, if counsel overlook the rule and follow the old practice, the matter may not come to the attention of the trial judge. If such cases occur, the clerk who makes return to the appeal should not include the evidence in full, and his due attention will usually prevent informality in this respect. In those instances, however, where the record reaches this court containing the evidence in full, we think general equity rule 76 provides a remedy which, at least during the transition in the general practice, will be sufficient. The reference in rule 76 to "any kindred rule" quite clearly applied to rule 75. It is true that the offending solicitor in this situation is the solicitor for appellant, and that appellant pays, in the first instance, the entire cost of printing, so that if he is unsuccessful in this court, no disposition of the costs of printing can operate as a penalty, but if he is successful, he can be denied the recovery of such costs; and the further affirmative costs, contemplated by rule 76, might, in a proper case, be imposed upon the offending solicitors. 222 Fed. 884; U. S. Comp. Stats. 1916, § 1536, p. 2528.

Rule 76. Record on appeal—Reduction and preparation—Costs—Correction of omissions. (In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement

of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.

If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript.) (New.)

Rule 77. Record on appeal—Agreed statement. (When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the district court or the judge thereof, may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement, when filed in the office of the clerk of the district court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal.) (New.)

Rule 78. Affirmation in lieu of oath. (Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.) (Identical 91.)

Rule 79. Additional rules by district court. With the concurrence of a majority of the circuit judges for the circuit, the district courts may make any other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed,[1] and from time to time alter and amend the same.

1 Omitted "in their discretion."
Supersedes old rules 89 and 90.

Rule 80. Computation of time—Sundays and holidays. (When the time prescribed by these rules for doing any act expires on a Sunday or legal holiday, such time shall extend to and include the next succeeding day that is not a Sunday or legal holiday.) (New.)

Rule 81. These rules effective February 1, 1913—Old rules abrogated. (These rules shall be in force on and after February 1, 1913, and shall

govern all proceedings in cases then pending or thereafter brought, save that where in any then pending cause an order has been made or act done which cannot be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice.

All rules theretofore prescribed by the Supreme Court, regulating the practice in suits in equity, shall be abrogated when these rules take effect.) (New.)

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Unless otherwise indicated, the statute, rule or provision is quoted in the section of the Manual referred to. The letter "r" following the statute or rule number indicates: reference, not quotation.

TABLE OF REVISED STATUTES.

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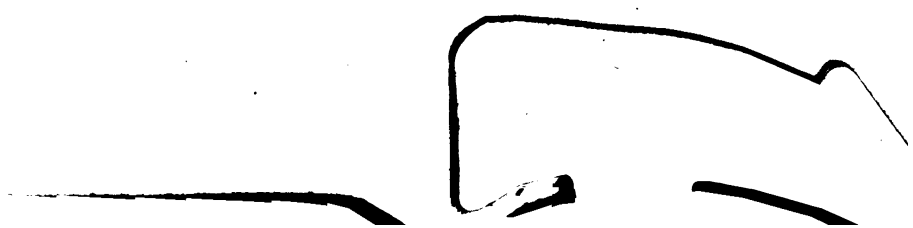
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